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NOTES.

In Memoriam.

JUST three months ago the profession underwent a heavy loss by the death of Mr. H. W. Challis, one of the last of the conveyancers of the old school, and worthy to stand with the best of them in the profound and subtle learning of their special branch. Mr. Challis began his studies for the Bar comparatively late in life; he was born (according to Foster's 'Men at the Bar') in 1841, took his B.A. degree at Oxford in 1864, and was called only in 1876. His professional reputation was therefore made with extraordinary rapidity. But for his temporary conversion to the Church of Rome he would no doubt have taken a Fellowship at Merton, where he was a Postmaster, and perhaps have become an emender of classical texts instead of a follower of Fearne and Preston. As it was, he was a disciple and ally of Cardinal Newman for some years, and taught Moral Philosophy at Edgbaston, little suspecting the more delicate intellectual bond that was to link him afterwards with the Catholic pure conveyancers of the last century. It was presumably this episode in his life that gave Mr. Challis a certain old-world and clerical manner, worn by him with a quite individual grace, and puzzling to the friends of his later days who did not know his history. We cannot undertake here to give an account of his work: but it cannot be too often repeated that Challis on Real Property is, and long will be, indispensable to the student who wants really to master the law. To such an one it may be said, after Quintilian's well-known pattern, 'When you take delight in Challis, you may know that you are on the way to be a real property lawyer.' Mr. Challis's friends were well aware, and those who read his excursuses with due care may discover, that there was a considerable reserve of humour behind his learning. F. P.

The incidental questions arising out of *Allen* v. *Flood*, '98, A. C. 1, 67 L. J. Q. B. 119, may long continue to furnish matter for discussion on both sides of the Atlantic. With regard to a humble attempt of my own to contribute some such matter on one point, it may be convenient to state here that I did not intend to propound any new theory of malicious prosecution as being of my invention, or as being correct, but only to see whether any coherent and arguable doctrine could be framed out of the scattered dicta of Lord Watson, Lord Herschell, and Lord Davey; though I do confess my opinion that anything on which those three learned persons are found substantially to agree is much more likely to be right than not. F. P.

The New Zealand Loan Co. v. *Morrison*, '98, A. C. 349, 67 L. J. P. C. 10, decides that the Joint Stock Companies Arrangement Act, 1870, does not apply to the Colonies, and that accordingly a scheme of arrangement sanctioned by an English Court cannot *in a Victorian Court* be pleaded as a defence to an action by a non-assenting Victorian creditor for the full amount of his claim.

A reader who wishes to understand the full importance of this case should place side by side with it *Ellis* v. *M'Henry*, 1871, L. R. 6 C. P. 228, and remember that the judgment of the Common Pleas has been accepted as of unquestioned authority during the last twenty-seven years.

Such a comparison of the two cases leads to some noteworthy results.

1. There exists a marked and an illogical distinction between the effect of a discharge under an English Bankruptcy Act and the effect of what is equivalent to a discharge under the Joint Stock Companies Acts; a discharge of the first kind is operative throughout the whole of the British Empire, a discharge of the second kind is operative only in the United Kingdom and perhaps only in England.

2. It is almost apparent that the Privy Council do not really approve of the principles supposed to be established by *Ellis* v. *M'Henry*, and should a case resembling *Ellis* v. *M'Henry* ever come before the House of Lords, the House may be called upon to decide whether the doctrine maintained by the Privy Council is or is not to be preferred to the doctrine upheld by the Court of Common Pleas.

3. Though the judgment in *The New Zealand Loan Co.* v. *Morrison* may be technically reconciled with the judgment in *Ellis* v. *M'Henry* by insisting upon differences between the language of the Bankruptcy Acts and the language of the Joint Stock Com-

panies Acts, it is manifest that the essential disagreement between the Court of Common Pleas and the Privy Council is due to a change of sentiment which influences judicial no less than parliamentary legislation. In 1871 an English Court felt no difficulty in holding that the wide terms of an Imperial Act extended the statute to the Colonies. In 1898 English judges are nervously afraid of trenching on the real independence of England's self-governing Colonial dependencies, and will not hold that any Act of the Imperial Parliament is intended to extend to the whole of the British Empire unless they are absolutely constrained to do so by language of which the meaning is unmistakable. The condition of opinion which has led to the judgment in *The New Zealand Loan Co.* v. *Morrison* accounts for the judgment of the House of Lords in *Colquhoun* v. *Brooks*, 1889, 14 App. Cas. 493. A lawyer must take both these cases into account when called upon to consider how far our Courts will give extraterritorial operation to Imperial statutes, and politicians who exaggerate the tendencies towards Imperial unity would do well to note that our judges at any rate are aware of tendencies which, whether we like them or not, make not for union, but for separation.

The decision of the Court of Appeal in *Manners* v. *Pearson*, '98, 1 Ch. 581, 67 L. J. Ch. 304, might seem inevitable were it not that there was a dissenting judgment. An action for an account under a continuing contract is not an action for a series of obligations arising on every instalment of the contract, nor for any certain sum whatever. It admits the account to be open, and nothing is due till the amount of the balance is finally ascertained. Consequently no question which assumes the existence of a definite debt—such as, here, a question of turning payments expressed in foreign currency into English currency—can arise before the account is taken, or be referred to an earlier date than the date down to which it is taken. Vaughan Williams L.J.'s dissenting judgment treats the difference between an action for an account and a series of actions for sums growing due under a continuing contract as a difference merely in form; which, with great submission, it is not.

Coghlan v. *Cumberland*, '98, 1 Ch. 704, C. A., shows that the distinction between a judge's and a jury's findings of fact when they come before a higher Court—a distinction founded on the different histories of Chancery and Common Law procedure—has not been abrogated by the Judicature Acts or any practice under them. A new trial is granted against the verdict of a jury (as several recent

decisions have laid down and confirmed the rule) only when the Court is satisfied that the verdict was such as *could not* have been arrived at by reasonable men upon the evidence in fact, and with due regard to the directions of the judge in law. But an appeal from a judge alone is a rehearing, and the duty of the Court is to rehear, form its own opinion, 'not disregarding the judgment appealed from, but carefully weighing and considering it,' and act upon that opinion, when formed, in matters of fact as well as of law. In brief, the Court of Appeal cannot touch the verdict of a jury without censuring it, but may differ respectfully from the findings of a judge.

Every volunteer, and indeed every Englishman, will thank the Court of Appeal for their judgment in *Marks* v. *Frogley*, '98, 1 Q. B. 888. It will go a great way towards making the discipline of a volunteer corps whilst in camp a reality. The Court have decided, first, that a volunteer is subject to military discipline as long as his corps is in fact under military training with regulars, and further, what is perhaps of even more importance, that under sect. 158 of the Army Act, 1881, a person who is charged with an offence under the Act can be kept in military custody even after he and the corps to which he belongs have ceased to be subject to military law. The net result of the case is that soldiers who in obedience to the command of their superior officer, and without the use of any unreasonable violence, convey a comrade charged with an offence to prison, run no risk of having to pay damages for acts which are after all the discharge of a duty.

The judgment of the Court in *Marks* v. *Frogley* turns technically upon the interpretation of certain sections in the Army Act, 1881, to which the attention of the Divisional Court whose judgment is reversed was not sufficiently called; but the tone of the judgments delivered by the Court of Appeal gives them an importance beyond the mere interpretation of a particular enactment.

The Court, in the first place, clearly agree with the judgments in *Keighly* v. *Bell*, 4 F. & F. 763, and *Dawkins* v. *Lord Rokeby*, 4 F. & F. 806, and are almost certainly prepared to support the just doctrine that a soldier who does an act, not on the face of it illegal, in obedience to the command of a superior officer, has not himself committed either a wrong or a crime, even if the order turn out to lack legal justification.

The Court, in the next place, pass a thoroughly deserved censure on the excessive damages given by the jury in an action against

soldiers, who even if they had ignorantly committed a technical breach of the law, were carrying out what they rightly believed to be their military duty and did nothing unreasonable in the execution thereof. It is well that such damages should be described in plain terms as 'excessive' and 'monstrous.' That the Courts should treat soldiers with absolute fairness is as essential as that soldiers, whatever their rank, should show absolute respect for the judgments of the Civil Courts. The natural justice of juries is often too apt to resemble that of 'My Aunt's case,' where a legendary County Court judge, being informed that the defendant could not pay, but had an aunt who could, gave judgment against the aunt.

A is a builder who enters into a contract with *X* to erect a building on *X*'s land for a lump sum. After *A* has done part of the work he abandons the contract and refuses to go on with the work. *X* completes the building at his own expense. *A* brings an action against *X* for the price of the work done. It is held by the Court of Appeal that the action is not maintainable. These are the facts and the result of *Sumpter* v. *Hedges*, '98, 1 Q. B. 673, 67 L. J. Q. B. 545, C. A. A layman is likely enough to think that the decision is unfair for that *X* got some benefit from *A*'s work and yet did not pay for it.

Yet it is clear that the judgment of the Court of Appeal is right whether you consider it in the light of authority, of logic, or of fairness.

The authorities, such as *Cutter* v. *Powell*, 1795, 6 T. R. 320, 3 R. R. 185, and *Munro* v. *Butt*, 1858, 8 E. & B. 738, are decisive.

The logical answer is complete. *A* cannot claim payment on the score of his original contract for the simple reason that he never performed it. He cannot claim payment on the score of any subsequent and tacit contract to pay for the worth of the work done, and this for the conclusive reason that there is nothing in the conduct of *X* from which the existence of such a contract can be implied or inferred. But if this be so there is no contract whatever under which *A* can claim payment from *X* or, in other words, *A* cannot insist upon the performance of a promise by *X* which it is admitted *X* never made.

The decision is as fair as it is logical. The ground on which *X* is in any case of contract bound to pay *A* for his work is not that *X* has received benefit from *A*'s labours, but that *X* has promised to pay *A* for his work. This principle is elementary but fundamental; if it were not strictly observed a man would constantly find himself involved in obligations which he had never

intended to undertake. But the essential feature of the case under consideration is that *X* had not promised to pay *A* for his work. The result is that *A* had no moral claim to be paid.

Montgomery v. *Liebenthal*, '98, 1 Q. B. 487, 67 L. J. Q. B. 313, C. A., determines that an agreement between *X* who is domiciled and ordinarily resident in Scotland with *A*, that a writ for breach of contract may be served by *A* on *X* by leaving it with an agent in England appointed by *X* to accept service, is valid, and that service upon the agent is good service upon *X*. The judgment of the Court of Appeal follows *Tharsis Sulphur Co.* v. *Société Industrielle des Métaux* (1889), 58 L. J. Q. B. 435, 60 L. T. 924, and will approve itself to most lawyers, but it must be observed that the principle established by the two cases may result in a great extension of what is really the extraterritorial jurisdiction of the Court. There is as far as we see nothing to prevent every English merchant when contracting with a foreigner from inserting in the agreement between them a provision binding the foreigner to accept service through an agent residing in England. But should such an arrangement become common, our Courts may constantly be required to adjudicate upon contracts made abroad with foreigners who are neither domiciled nor ordinarily resident in England.

Spooner v. *Browning*, '98, 1 Q. B. 528, 67 L. J. Q. B. 339, C. A., is a case which deals rather with the inference to be drawn from a given state of facts, than with the rule of law applicable to the facts. *P*, a stockbroker, has allowed *A*, a clerk in his employment, to collect orders for the purchase of shares for *P* upon commission, and *T*, a third party, has on three occasions given orders to *A* which *P* has duly executed. The point to be decided is whether *P* has not so held out *A* as his agent authorized to enter at any rate with *T* into contracts for him, that when *T* gives a fourth order which *A* takes in the ordinary way, but does not transmit to *P*, *T* has a right to assume that *P* has undertaken to execute the order. The majority of the Court of Appeal (A. L. Smith L.J. and Chitty L.J.) have held that *P* did not hold out *A* to *T* as *P*'s agent, and therefore never entered into any contract with *P* for the purchase of shares. From this judgment Collins L.J. has dissented. It were rash to pronounce a decided opinion where judges so eminent disagree, but some regret may be felt that the view of Collins L.J. has not prevailed. The course of business in modern days rests upon the strict enforcement of the principle that a trader is bound by the action of any man whom he gives third persons fair reason to suppose to be acting as his agent.

Ninety-nine persons out of a hundred would under the facts set forth in *Spooner* v. *Browning*, have presumed that *A* was authorized to act for *P*, and as this presumption was caused by the conduct of *P* it would seem that *P* did hold out *A* as his agent.

Presumptions are useful where direct evidence is not forthcoming. They have probability in their favour in this sense, that they represent what generally does happen or what people generally do mean; but if it is possible to ascertain what the parties in a given transaction did really mean, it is preferable to guessing: witness *Paget* v. *Paget*, '98, 1 Ch. 470, 67 L. J. Ch. 266, C. A. Thus it was all very well in the old days, when husband and wife were one and the husband was 'that one,' to presume that a wife acted up to her marriage vow, and that when her husband wanted money to pay his gambling debts or to keep up his social position, the docile and dutiful wife cheerfully acquiesced in the sacrifice of her fortune; and as a corollary from this presumption Equity might very well say to the husband, 'You have taken advantage of your marital influence and authority, and you must indemnify your wife for what she has had to spend in helping you.' But matrimonial relations have in these days suffered a change into something sad and strange: the wifely docility—the beautiful Griselda-like patience and fidelity—is not always forthcoming when wanted. Hence it is better to know whether in fact the wife claiming indemnity was, when she raised the money, 'puppet to a husband's wish,' or acting as much for herself and in her own interests as her husband's. In *Paget* v. *Paget* this latter was clearly what happened. Husband and wife were both like Mrs. Boffin, 'high-fliers at fashion,' and resolved at all hazards of broken fortunes to achieve their ambition. Then came separation, and separation is a very refracting medium through which to view past conduct.

In dealing with cases of trade name it is very necessary to reckon with the advertising enterprise of to-day. A trade name, whether it is one descriptive of beauty soap or British beer, of the dainty cigarette or prize baby food, has now an illimitable field of operations, and its potentiality for mischief as well as profit is proportionately increased. This reflection is suggested by *Manchester Brewery Co.* v. *North Chester and Manchester Brewery Co.*, '98, 1 Ch. 539, 67 L. J. Ch. 351, C. A., where a company having bought the business of the North Chester Brewery Co. tacked on to their title the words 'and Manchester Brewery Co.,' and registered the name as that of a new company. Had there been no Manchester Brewery Co.

of course no harm would have been done, but inasmuch as there already was—though the promoters of the new company were strangely unaware of the fact—the overlooked company naturally objected, and, as the Court of Appeal held, justly objected, to the assumption. People in the trade—at all events the customers of a company like the Manchester Brewery Co.—may know the truth, but the public at large—the great gullible public—does not. How should they? The impression created in such a case would certainly be that there had been an amalgamation, or rather that the North Chester Brewery Co. had taken over the business of the other company. This kind of infringement is inexcusable. 'The world is wide,' as Bowen L. J. once said, 'and there are many names.' The adoption of a name that bears even a semblance of similarity to another for a similar business can but suggest one inference, and that a discreditable one.

To be a lunatic is a bad enough affliction, but to be a pauper as well is a multiplication of woes which only a Greek tragic chorus could do justice to. Impressed with this, the Court which presides over the fortunes of lunatics, in its pitying paternal jurisdiction, will not allow the creditors of a lunatic to strip him of all means of maintenance. With us, as with that 'strict Court of Venice,' there are limits to the rights of creditors. They must wait for the lunatic's death, or, if his capital is needed to keep him, must be put off even to the Greek kalends. But this benevolent rule in favour of the indigent lunatic is—it is instructive to note (*In re Clarke*, '98, 1 Ch. 336, 67 L. J. Ch. 234, C. A.)—merely a rule of administration. The Court has its hand on the property of the lunatic and may deal with it charitably—looking, that is, first of all to the comfort of the lunatic. It would be quite another thing for the Court, before it has seisin of the lunatic's property, to interfere, as it was asked to do in *In re Clarke*, with the common law rights of creditors. An execution creditor who has seized is in the position of a secured creditor, and the Court has no right to take from him the advantage he has gained by his superior diligence. Lunacy is not like administration of the estate of a bankrupt or deceased insolvent. The Court in Lunacy has no power to compel a creditor to come in and prove his debt by restraining him from issuing execution, if he can do so without interfering with the officers of the Court.

It would be interesting to know, if any statistician could tell us, what is the effect of the austerity of the law in respect of gaming and wagering contracts. Do they wither or do they thrive under

the frown of the law? Thrive probably, for the only effect of the law's irrecognition is to convert a debt from being no debt into a security of a higher order than a debt, that is to say a debt of honour. On the other hand, when the estate of an outside broker like Cronmire falls into the hands of a trustee in bankruptcy (*In re Cronmire Expte Waud*, 78 L. T. 483) the debt of honour sinks to the level of a mere legal obligation, that is no obligation at all. There is—or was—a rule of etiquette in Japan by which when a gentleman was insulted he might rip himself up, and his insulter was then bound by all the rules of good breeding to do the same. A British sailor put an affront on a Japanese. The Japanese punctiliously ripped himself up. The sailor looked on with curiosity, interested but with no intention of doing likewise. A trustee in bankruptcy is in much the position of the British sailor. He is bound, as James L. J. said, to be as honest as other people, but he enjoys immunity from that code of honour which rules the turf, the gambling house, and the bucket shop—he is bound indeed to ignore it. This puts him in a very favourable position. He keeps the winnings of the debtor's clients and repudiates liability for losses. In respect of 'cover' the case is different. 'Cover' is a word which has got into bad company and lives among a sporting and speculative set, but in itself it is innocent enough—nothing worse than security against a possible future fall in stocks or shares. Till the gambling has begun there is no taint attaching to the cover. If the gamble never comes off there is no reason why the depositor should not have it back again: so think a tolerant Court of Appeal.

Are persons guilty of malicious damage to property under the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 51, if they pull down a building in defence of an alleged claim of right on the part of the public to the use of a given piece of land?

This is in substance the question raised before the Court for Crown Cases Reserved in *The Queen* v. *Clemens*, '98, 1 Q. B. 556, 67 L. J. Q. B. 482.

The answer given by the Court appears to be that the two questions to be considered by a jury are, first, did the defendants who admittedly pulled down the building act in the exercise of a supposed right? secondly, did the defendants do no more damage than they might reasonably suppose to be necessary for the assertion or the protection of the alleged right? If both these questions are answered in favour of the defendants they are not guilty of doing malicious damage within the meaning of the statute.

This answer conforms to good sense. To some people, however, it may occur that the time for the forcible assertion of rights by the extra-legal efforts of individuals has gone by. In a perfectly civilized state of society questions of legal right ought to be determined solely by the Law Courts, and the judgment of the Courts be enforced by the officers of the law. Curiously enough, the law of the thirteenth century was much stronger against self-help, even without violence, than our modern decisions.

What is a 'place'? This would appear to be a logical, we might almost say a metaphysical, question of considerable difficulty, yet it is an inquiry to which, in some way or other, our judges must find an answer. A gentleman whose habit it is to bet under a particular archway has raised the point that the archway was not a 'place' within the Betting Act, 1853 (16 & 17 Vict. c. 119), ss. 1, 3. The Court for Crown Cases Reserved has determined that the archway was a 'place,' and that in consequence John Humphrey, the gentleman given to bet, was rightly convicted of the offence of using a place for the purpose of betting. Who shall venture to say that the judges who decided this point were wrong? A curious set of inquiries, however, suggest themselves. Is it possible for any man to make bets anywhere without making use of a 'place' for the purpose? But is it then the intention of Parliament to prohibit all betting? Is there not, lastly, something rather curious in the condition of the law as to the making of bets? The line of cases, of which *The Queen* v. *Humphrey*, '98, 1 Q. B. 875, 67 L. J. Q. B. 534, is the last, raise an uncomfortable suspicion that a poor man or an ordinary bookmaker can hardly make a bet at all without violating the law, because he must necessarily use some place for the purpose, but that by some process which it is difficult to understand, wealthy persons who have bets, say on the Derby, can somehow risk a good deal of money without using any 'place' within the meaning of the Betting Acts. Is a club a 'place'? It is a good enough *locus* in the mathematical sense, for any member known to be in the club-house can be found. But the judges have virtually declared that the Legislature has set them a hopeless puzzle.

The philanthropists who some sixty years ago and more set going the factory legislation would be surprised, and perhaps alarmed, at the issue of their labours. Lord Shaftesbury and most of his followers acted from motives of simple humanity: their one predominant desire was to protect from gross cruelty children who were incapable of protecting themselves. But any thoughtful

man who even glances at our law reports will see that laws devised simply for the protection of the helpless have already developed into a system for the State regulation of industry. Read together, for example, *Schwerzerhof* v. *Wilkins*, '98, 1 Q. B. 640, 67 L. J. Q. B. 476, *Blenkinsop* v. *Ogden*, '98, 1 Q. B. 783, 67 L. J. Q. B. 537, and *Prior* v. *Slaithwaite Spinning Co.*, '98, 1 Q. B. 881. They all illustrate the working of the factory laws, and are all reported within one quarter of the year; they all prove that the liability of an employer for the mode in which he conducts his business and for damage which in any way results to his work-people therefrom has been immensely increased, and is liable to indefinite extension. If, for example, a person is injured by a manufacturer's neglect to fence in his machinery, the employer's liability to a fine is not got rid of by the fact that the damage was proximately caused by the contributory negligence of the sufferer. A young person for his own amusement and contrary to orders oils part of the machinery of a mill during the time allowed for meals; the millowner is liable for employing the youth during prohibited hours and thereby incurs a fine. We do not for a moment assert that the decisions of the Court in these and similar cases are wrong; we have no intention of questioning the expediency of our factory legislation. All that we wish to note is that it is a branch of law which has developed with extraordinary rapidity and to an extent and in directions not foreseen by the philanthropists of the last generation. The one certain conclusion which an examination into our industrial legislation establishes is that when once the State intervenes in the management of trade there arises an impossibility of putting limits to the State's intervention.

The *Kharaskhoma* case has naturally had the effect of rendering holders of shares issued as fully paid under a registered contract uneasy as to their position. The principle of that decision was a perfectly sound one: that to satisfy the cash-payment section—s. 25—of the Companies Act, 1867, the consideration for the issue of the shares must appear on the face of the contract, so that members of the company and persons dealing with it may know precisely what equivalent for cash the company has got in return for the shares it has issued as fully paid up. They may not be able to gauge precisely the value of what is set out as the consideration, but they can form a pretty shrewd judgment whether it is substantial, or something illusory like services, or goodwill, or commission. If they are met by an agreement which merely recites a previous agreement and refers to property specified in the schedule to such previous agreement, this sort of disclosure discloses nothing. It must

be a very pertinacious shareholder who will follow up such a trail. Many of the contracts registered have, however, been of this kind, not from want of *bona fides* but for want of an authoritative ruling on the meaning of the section. Now the ruling has come, and the persons whose titles are shaken by it—who may have to pay for their shares over again—have only one course open to them, and that is the course taken in *In re Maynards Limited*, '98, 1 Ch. 515, 67 L. J. Ch. 186, to get the Court to rectify the register under s. 35 of the Companies Act, 1862, by striking out the shareholders' names, and then to register a fresh contract with no flaw in it; but to do this, the company must be going and solvent. If creditors' rights have intervened, it is too late. Section 25 of the Act of 1867 is certainly a dangerous sunken rock. 'Repeal it' is the cry of some, but to do this would only be to play the game of the unprincipled promoter.

The love of fair play is a British characteristic, and it shows itself in our law no less than in our politics and our sports. In France when a man is charged the object is to get a conviction in the interests of the public; with us it is to give a fair trial. We prefer ten guilty men to escape to one innocent man being convicted. In civil matters it is the same. Forfeiture, for example, is felt to be unfair. Common law leans against it; equity relieves. Re-entry by a landlord for non-repair is an instance in which the penalty is out of all proportion to the injury. The non-repair may have been due to oversight, accident, or ignorance; so the law in s. 14 of the Conveyancing Act has qualified the lessor's right by requiring notice, and here again the same spirit of fairness is observable. It is not any notice, but notice specifying the particular defects, so that the tenant may know what he is required to do. In *Fletcher* v. *Nokes*, '97, 1 Ch. 271, 66 L. J. Ch. 177, the notice related to half a dozen houses without indicating in what respect default had been made, and North J. held the notice bad. Kekewich J. in *In re Serle, Gregory* v. *Serle*, '98, 1 Ch. 652, 67 L. J. Ch. 344, carries the thing still further. Want of particularity in one part of a composite notice will invalidate the whole; and not without reason. The tenant may say to himself, If I whitewash this part of the premises I may still have my lease forfeited for something I ought to have done elsewhere in painting or repairing, but which was never clearly pointed out to me.

A learned correspondent writes:—

What will posterity say, we wonder, to our system of land purchase, with its retrospective investigation of title for sixty, or in its

mitigated form forty years?—the whole history of an estate—mortgages, settlements, wills, leases, sales, appointments, covenants for production of deeds ransacked on every fresh dealing. Well might James L. J. say, *apropos* of 'new-fangled' requisitions, that the expense and delay in the investigation of titles was almost a disgrace to the law of the country; but custom reconciles to anything, and destroys all power of self-criticism. The system would long ago have become intolerable but for the common condition entitling a vendor, when pressed by vexatious or unreasonable requisitions, to cut the negotiations short and say, 'Very well! if you persist in pressing this objection I terminate the bargain.' *Deighton and Harris' Contract*, '98, 1 Ch. 458, 67 L. J. Ch. 240, C. A., will be a salutary warning in this respect to exacting purchasers. Without venturing to speak disrespectfully of the legal estate, it must be admitted that conveyancers and the devotees of the mysteries of equity cherish an almost morbid sentiment on the subject. In the above case the purchaser's solicitor had this in an acute form, and insisted on the legal estate being got in, though it was outstanding in so harmless a person as the Official Receiver. What does such a requisition mean? An application to the Court, more costs, delay. No wonder the vendor turned to bay. The purchaser tried to minimize the effect of the clause, by contending that the words 'any other matter or thing relating to or incidental to the sale' did not cover a 'conveyance'; but it was an argument of despair, and the net result to the purchaser was that thanks to the too officious sedulity of his advisers he lost his bargain, and in lieu of it was presented with a long bill of costs.

French, Italian, and German tribunals called upon to apply, and eminent continental professors, such as Lainé, Buzzati, and Bar, called upon to formulate the rules of private international law are at this moment deeply concerned with the question of the *Renvoi* or, as the Germans with additional precision have it, *Die Rück-und-Weiterverweisung*. Yet an English specialist versed in the problems raised by the conflict of laws may well have never heard the name of the *Renvoi*.

The principle of the *Renvoi* is (to put the matter as shortly as may be) that when the Courts of one country, e. g. England, determine that a given matter, e. g. the validity of a will made by *T*, an Englishman and British subject domiciled in France, is to be decided in accordance with the law of France, they include in the term law of France the French rules as to the choice of law, and if, as indeed is the case, French law thus understood lays down that the validity of *T*'s will depends upon the law of his nationality, i. e. in this case

the territorial law of England, then the English Courts will treat the case as sent back (*Renvoi*) or remitted to English law for its decision, and determine the validity of *T*'s will in accordance with the ordinary territorial law of England. This is the *Renvoi* in its simplest form. But the case may be more complicated. An Italian subject, leaving moveable property in England, dies domiciled in France. The English Courts are called upon to determine the succession to his moveables. They hold that the succession must be regulated by the law of France, but they also find that under the law of France, if you include in that term French rules as to the choice of law, the succession to *T*'s moveables is governed by his national law, i.e. by the law of Italy. If, as is almost certainly the case, the English Courts will then hold that because they wish to carry out in regard to *T*'s moveables the law of France, they must ultimately distribute them in accordance with the territorial law of Italy, then they recognize what has been called the *Renvoi* in its second degree, or to use German phraseology, the *Weiterverweisung*.

The moment the nature of the *Renvoi* is explained it becomes apparent to any lawyer that the principle of the *Renvoi*, though not the name for it, has been long known to English Courts and has been discussed by English writers on private international law. (See e.g. *In Goods of Lacroix*, 2 P. D. 94; Williams on Executors, 9th ed., vol. ii, p. 304; Dicey, Conflict of Laws, p. 75.)

On another occasion we hope to examine how far the principle of the *Renvoi* is valid and to what extent it has been adopted by English Courts. Meanwhile we venture a suggestion which may facilitate the discussion of an intricate question. The word *renvoi*, for which there is no English equivalent, may be well rendered by the word 'remission,' in the sense in which we say a case is 'remitted' by a superior Court to an inferior Court to be further dealt with, and if the ambiguity of the word remission be objected to, we may adopt the suggestion of a very learned lawyer, and introduce the grammatically awkward term 'remittal.' *Weiterverweisung*, if we need to express the idea signified by it, may be well rendered by the word 'transmission.'

In the *Law Magazine and Review* for May the Lord Chief Justice has an excellent paper on legal education. His opinion of the insane policy of the Council of Legal Education in dismissing all the teaching staff as soon as they have had enough experience to know their business is the same which has been expressed by every competent person who has considered the matter. He points out that the establishment of a teaching university in London will give

the opportunity of creating a real law school, and the opportunity ought to be promptly taken. Lord Russell of Killowen's judicial position does not allow him to say what unhappily is true, that the Inns of Court may be confidently expected to do nothing except on compulsion.

The learned writer of an unsigned paper in reply to the Lord Chief Justice which has been circulated among some members of the Equity Bar appears to think that the Lord Chief Justice makes a personal attack on the present and late Readers and Assistant Readers. As we understand him, he does nothing of the kind: on the contrary, he commends them for doing their best under almost impossible conditions. If the Council of Legal Education is right in holding that (1) frequent and systematic changes in the teaching staff are desirable, (2) students may safely be left to attend the lectures or not as they please, then most Universities and institutions claiming University rank in the world, including all other law schools of any importance, are wrong.

ERRATUM.

On p. 109 above, in the April number, and in the last note on the page, the word 'England,' where it first occurs, is an obvious slip of the pen for 'Jamaica.' We have once or twice observed that it is the nature of the most obvious slips to be overlooked in correcting proofs.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

CONTINGENT REMAINDERS AND THE RULE AGAINST PERPETUITIES—A CRITICISM OF THE CASE OF *WHITBY* v. *MITCHELL*.

AN article appeared in the last number of this REVIEW, written by Mr. E. C. C. Firth, and contending that the limitation of contingent remainders is properly governed by the rule in *Whitby* v. *Mitchell*[1] alone, and not, as held in *Re Frost*[2], by the rule against perpetuities as well, and that the latter decision ought to be repudiated. I wish to offer some considerations why the rule in *Whitby* v. *Mitchell* should be abased, as having no foundation either in reason or authority, and the decision in *Re Frost* exalted, as being consistent with principle; though I do not think that all the reasons given for the latter decision can be supported.

As things stand at present, conveyancers cannot safely disregard either of these cases; and the law is anomalous to an absurd degree. If a man desire to make a settlement of land by way of shifting use, executory devise or declaration of trust, he may create such contingent interests as he will, provided only that they be limited in conformity with the rule against perpetuities, which requires them to be such as must necessarily vest, if at all, within the duration of existing lives and twenty-one years after. So long as these limits are observed, he can confer indestructible interests on the unborn to the third and fourth generation; as it has long been completely settled that an executory limitation in favour of a man's issue or descendants in however remote a degree is perfectly unobjectionable, if only the persons intended to benefit must be ascertained within the time allowed by the rule against perpetuities[3]. If however it be desired to make a settlement by way of successive contingent remainders of legal estates, the settlor must observe the following rules, if he desire to make unquestionably valid limitations. As to the first of his contingent remainders, he need only regard the doctrine that it must be supported by an estate of freehold, and will fail (unless preserved by the Contingent Remainders Act of 1877[4]) if it do not vest during or immediately on the determination of the particular estate. But in limiting the

[1] 42 Ch. D. 494; 44 Ch. D. 85.

[2] *Hockley* v. *Mawbey*, 1 Ves. jun. 143, 150, 1 R. R. 93; *Routledge* v. *Dorril*, 2 Ves. jun. 357, 362, 2 R. R. 250; *Thellusson* v. *Woodford*, 4 Ves. 227; Sug. Pow. 397, 8th ed.; see below, p. 237.

[3] 43 Ch. D. 246.

[4] Stat. 40 & 41 Vict. c. 33.

rest of his contingent remainders, those to take effect after the first, he must take care not to break either of these rules:—first, that an estate cannot be well limited, in remainder after an estate given to an unborn person, to any child of such unborn person, and secondly, that a contingent remainder limited to take effect after a contingent remainder will be void, unless it must necessarily vest within the period allowed by the rule against perpetuities. The former rule is that laid down in *Whitby* v. *Mitchell* as an absolute rule independent of the rule against perpetuities; the latter is the rule in *Re Frost*. The practical result is that by the simple device of vesting the legal estate in trustees, land can be tied up for quite a generation longer than if estates at law be given by way of contingent remainder to the beneficiaries. For example, if land be limited to *A*, a bachelor, for life, with remainder to *A*'s first son for life, with remainder to the first son to be born within twenty-one years after *A*'s death of the first son of *A* for life, with remainder to the first son to be born within the same period of such first son of the first son of *A* in tail or in fee, all the limitations subsequent to that to *A*'s first son are, according to *Whitby* v. *Mitchell*, void at law. But if such limitations were made of the equitable estate in land, the whole of them would be unquestionably valid [1], contingent remainders of equitable estates being governed by the rule against perpetuities alone [2]; which, as we have seen, allows of gifts to unborn descendants in any degree. Is our law really so ridiculous as this? I hope to show that it is an unsound decision which apparently makes it so.

In *Whitby* v. *Mitchell*, land was limited by marriage settlement, after life estates to the intended husband and wife, to the use of the issue of the marriage as the parents should by deed jointly appoint. The parents appointed one moiety to each of their two daughters for life, with remainder to the daughter's children *living at the date of the deed of appointment* equally in fee. These remainders were held void both by Mr. Justice Kay and the Court of Appeal on the ground that there is a rule of law, independent of the rule against perpetuities, that an estate cannot be well limited, in remainder after a life estate to an unborn person, to any child of such unborn person. When however we search the judgments for the judicial authority establishing this rule, we find that Mr. Justice Kay gave absolutely none, but was avowedly content to take the word of the late Mr. Joshua Williams for the proposition he laid down. In the Court of Appeal certain judicial *dicta*, said to establish

[1] These are the limitations which, Mr. Joshua Williams admitted, would be clearly unobjectionable, if the rule against perpetuities were the only restraint upon them: Williams, Real Prop., App. F, p. 531, 13th ed.; App. E, p. 632, 18th ed.

[2] *Abbiss* v. *Burney*, 17 Ch. D. 211.

the rule, were referred to, but the main pronouncement of the Court was to confirm Mr. Williams's assertions[1] that there is such an independent rule as above stated, and that this rule is derived from the old doctrine against double possibilities. And upon these propositions their judgment was founded. It is therefore precisely these statements by Mr. Joshua Williams that I desire to controvert.

In the first place, I submit that the supposed doctrine that there cannot be a possibility upon a possibility is in its general form altogether discredited, and has no place in the law. The limits of space forbid my setting out here the whole proof of this. It has been demonstrated at large, with full consideration of all the cases, by Professor J. C. Gray, of Harvard University, in his treatise on the Rule against Perpetuities[2]. Mr. Gray has, I think, conclusively shown that this supposed rule is merely a conceit invented by the Lord Chief Justice Popham[3], utterly unsupported by any of the authorities cited in proof of it[4], repudiated in Court by Lord Coke himself[5], and denied as unreasonable by Lord Nottingham[6]. It is true that the nonsensical propositions laid down in *Cholmley's* case[7], that the possibility on which a remainder is to depend must be a common and not a remote possibility, were devoutly copied both by Blackstone[8] and Fearne[9]. Mr. Charles Butler, however, in his note on Fearne's text[10], shows plainly that the doctrine which Fearne felt constrained to adopt is not law. The passage is worth quoting:—

'The expression of a possibility upon a possibility, which in the language of Lord Coke cited in this place[11], is never admitted by intendment of law, must not be understood in too large a sense. A remainder to the son of *A* who first or alone shall attain twenty-one is so far a possibility on a possibility, as it depends for its effect on the happening of two possible events, that *A* shall have an eldest or only son, and that such son may attain twenty-one; but the validity of such a remainder is unquestionable. In *Routledge* v. *Dorril*, 2 Ves. jun. 357, a moneyed fund was vested in

[1] Real Property, 276, 13th ed.

[2] Boston, 1886, pp. 80–86, 135, 139, 140.

[3] 1 Rep. 156; 2 Rep. 51; 8 Rep. 75; 10 Rep. 50 b; 3 Bulst. 98, 108.

[4] These are 12 Ass. pl. 5; Y. B. 10 Edw. III. 45, pl. 8; 18 Edw. III. 39, pl. 34; 24 Edw. III. 29, pl. 17; Fitz. Abr. Taile, pl. 13; Y. B. 7 Hen. IV. 16, pl. 9; 9 Hen. VI. 23, 24; 2 Hen. VII. 13; Moore, 103, 104.

[5] 1 Rolle Rep. 321, where he says, 'If Popham's opinion should be law, it would shake the common assurances of the land.'

[6] *Duke of Norfolk's* case, 3 Ch. Ca. 29; 2 Swanst. 458–9. His words are, 'That there may be a possibility on a possibility, and that there may be a contingency on a contingency, is neither unnatural nor absurd in itself; but the contrary rule given as a reason by my Lord Popham in the *Rector of Chedington's* case looks like a reason of art; *but in truth has no kind of reason in it*, and I have known that rule often denied in Westminster Hall.'

[7] 2 Rep. 51. [8] Comm. ii. 169. [9] C. R. 250, 9th ed.

[10] C. R. 251 n., 9th ed. [11] i. e. in Mr. Fearne's text.

trustees, in trust for the intended husband and wife for their lives successively, and, after the decease of the survivor of them, in trust for all and every the children and grandchildren or issue of the said intended marriage, in such shares and at such times as the parents or the survivor of them should appoint, and for want of such appointment, in trust for all and every the children and grandchildren, or issue of the marriage, if more than one, who should be living at the decease of the surviving parent, in equal shares, payable to the sons at twenty-one, and to the daughters at twenty-one or marriage. The Master of the Rolls held, that it was competent to the parties to have appointed among all the issue living at the death of either the husband or the wife, whether in the first, second, or third degree; and that, so far as the power was not well executed, the fund was to be divided as if no appointment had been made. Now it is evident, that, to entitle a grandchild to take under the latter trust, four events must happen,—that the husband and wife should have a child, that such child should have a child, that such last mentioned child should be alive at the decease of the survivor of his grandfather and grandmother, and that if such child were a grandson he should attain twenty-one, and if a granddaughter, attain that age or marry.'

Mr. Preston also ably exposed the fallacy of the supposed doctrine against a double possibility[1]. The Real Property Commissioners concurred in Lord Nottingham's condemnation of it[2]. Lord St. Leonards pronounced it to be obsolete[3]. And finally, it was vehemently attacked by Mr. Joshua Williams[4], who exposed it as originating in 'the mischievous scholastic logic' then rife in the law-courts, but founded neither in reason nor on authority. He plainly declared that, though long kept alive in our law-books out of respect for the memory of its author, this doctrine had ceased to govern the creation of contingent remainders. There is therefore a *consensus* of most respectable opinion against the doctrine, including that of the very men[5] on whose authority the decision in *Whitby* v. *Mitchell* was given[6].

[1] 1 Prest. Abst. 128, 2nd ed.
[2] Third Rep. 29.
[3] *Cole* v. *Sewell*, 2 Conn. & Laws. 344, 4 Dru. & War. 1, 32.
[4] Real Prop. 210–211, 1st ed.; 274–6, 13th ed.; 340, 18th ed.
[5] Mr. Charles Butler, Lord St. Leonards, and Mr. Joshua Williams.
[6] The doctrine against double possibilities was not asserted in its general form in *Whitby* v. *Mitchell*. In *Re Frost*, however, Kay J. attempted to support his decision by an assertion of the doctrine in all its native simplicity of supposed prohibition of a double contingency (43 Ch. D. 253). His remarks are, I think, sufficiently refuted by the passage quoted above from Mr. Charles Butler's notes to Fearne C.R. But it is very amusing that Mr. Justice Kay, who in *Whitby* v. *Mitchell* expressed the most complete submission to Mr. Joshua Williams's authority, should have been constrained to decide the very point which Mr. Williams had most vehemently contested—namely, that contingent remainders are governed by the rule against perpetuities—and should have endeavoured to support his decision by re-asserting a doctrine which Mr. Williams had exerted all his literary skill to denounce as a piece of pernicious nonsense, not received as law.

Secondly, it was alleged by Mr. Joshua Williams (and his statement in this respect was in effect adopted in *Whitby* v. *Mitchell*) that, although the doctrine against double possibilities cannot be maintained in its general form, there is yet an old rule, derived from that doctrine, which prohibits the limitation of any estate, in remainder after an estate given to an unborn person for life, to any child of such unborn person. And it was asserted in *Whitby* v. *Mitchell* that this rule was in existence before the rule against perpetuities was formed. It is submitted that this assertion is historically untrue, that the supposed rule was originally nothing more than the quotation of an instance of an estate obviously void for remoteness, and that the connexion of this instance with the doctrine of double possibilities was not made until long after a rule against perpetuities had been definitely established, and can be traced to a source void of authority.

As to the historical aspect of the case[1], no question of remoteness of limitation arose under the early common law[2], which knew nothing of contingent remainders[3] or executory interests, either of freeholds or chattels. It is true that landowners appear to have been desirous of making settlements of their lands from the earliest times[4]; but at first this was usually effected by means of gifts to living persons in special tail[5]. Then, for a great part of the fourteenth and throughout the fifteenth century, it was the general practice to put lands in feoffment to uses[6]. Our information as to what uses would be held valid in equity is very scanty; but there seems to be no reason to suppose that it was the practice to declare uses in favour of unborn sons as purchasers[7]. The validity of a contingent remainder appears to have been first admitted at law in 1431[8]; whilst limitations to unborn sons as purchasers have not been found in any settlement made earlier than 1556[9]. Such

[1] My statements are really little more than a summary of the result of the exhaustive researches of Mr. J. C. Gray in the history of the rule against perpetuities. See Gray, Perp. ch. v.

[2] 3 Rep. of R. P. Commrs. 29; Gray, Perp. § 123, p. 79.

[3] Y. B. 11 Hen. IV. 74, pl. 14, per Hankey; Litt. s. 721; Williams, Real Property, 265, 266, 13th ed. (331, 332, 18th ed.).

[4] See Bract. fo. 18 b, 67 a, 69 a, 262 b; Maitland, L. Q. R. vi. 22; Pollock and Maitland, Hist. Eng. Law, ii. 23–25.

[5] J. Williams, Juridical Society Papers, i. 47; Williams on Seisin, 152–3, 187.

[6] 1 Sand. Uses, 15–19.

[7] No such uses are found in any of the cases printed in the Calendar of Proceedings in Chancery (Record Commission) or the Select Cases in Chancery (Selden Society, vol. x). There is, however, an interesting case, *Manning* v. *Andrews*, 1 Leon. 256 (see Gray, Perp. § 132, p. 86), showing an attempt made in 8th Hen. VIII. to create a perpetual settlement by means of a will directing the testator's feoffees to make life estates only to successive generations of heirs with a proviso that such estates should cease on alienation. It is remarkable that no objection appears to have been made to this settlement by the judges either on the score of perpetuity or of its limiting estates to the children of the unborn.

[8] Y. B. 9 Hen. VI. 24 a.

[9] J. Williams, Jurid. Soc. Papers, i. 47; Williams on Seisin, 187–8.

limitations have every appearance of being an attempt to strike out a new mode of settlement in consequence of the effectual abolition [1] by the Statute of Uses of the practice of vesting lands in feoffees to uses [2]. This new mode of settlement must have received a blow when it was held that contingent remainders raised by way of use were destructible by the tenant for life, as well as contingent remainders limited directly [3]; and it was not until the invention in the middle of the seventeenth century of the device of trustees to preserve contingent remainders that the modern system of settling land, by giving life estates to the living with remainders to their unborn sons in tail, was fairly inaugurated [4]. Meanwhile, shifting uses and executory devises of freeholds had come under the cognizance of the Courts of common law in consequence of the Statutes of Uses (1535) and Wills (1540) [5]. It was not, however, in connexion with interests so created that the rule against perpetuities first took shape [6]. As Mr. J. C. Gray has shown, this rule owes its origin to the consideration by the Courts of the validity of executory devises of terms of years [7]. Terms were of course always devisable as chattels [8]; but executory devises of terms do not appear to have come in question before the time of the Statute of Uses [9]. Such devises, at first held void [10], were after much conflict of opinion established in *Manning's* [11] case (1609), and *Lampet's* [12] case (1612). Up to this time no need had been felt for any rule prohibiting limitations to take effect at too remote a time as regards either shifting uses or executory devises; for at first it was considered that executory interests in freeholds were destructible by feoffment or otherwise in the same manner as contingent remainders [13]. When, however, it was settled that such interests were indestructible [14], and the validity of executory devises of terms had been established, it became obvious that some limit must be placed to the time within which contingent interests

[1] See note 2 to p. 242, below.

[2] The settlement in *Chudleigh's* case, 1 Rep. 120, made in 1556, with its strange device of limiting the lands given to the settlor and his heirs to be begotten on the bodies of the wives of his feoffees for a series of successive estates in special tail (explained, Poph. 76; Law Quarterly Review, xiii. 4–6), has certainly the air of a new invention. And see Williams on Seisin, 188–192.

[3] *Earl of Bedford's* case (1592), Moore, 716, pl. 1006; *Chudleigh's* case (1595), 1 Rep. 120.

[4] See Williams on Seisin, 192–4.

[5] Stats. 27 Hen. VIII. c. 10; 32 Hen. VIII. c. 1.

[6] There is no case as to the remoteness of a conditional limitation of a freehold or copyhold estate until *Snow* v. *Cutler* (1664), 1 Lev. 135; Gray, Perp. § 139, p. 90.

[7] Perp. §§ 140, 160–9, pp. 91, 106–113.

[8] Bract. fo. 131 a, 407 b.

[9] Gray, Perp. §§ 148–152, pp. 96–8.

[10] 1536, *Anon.* Dyer, 7 a.

[11] 8 Rep. 94 b.

[12] 10 Rep. 46.

[13] *Woodliff* v. *Drury* (1595), Cro. Eliz. 439; Gray, Perp. §§ 142–3, pp. 93–4.

[14] *Smith* v. *Warren* (1599), Cro. Eliz. 688; *Fells* v. *Brown* (1620), Cro. Eliz. 590.

should be allowed to arise; otherwise land might be placed in perpetual settlement, an end against which the policy of the law had already declared[1]. The law was painfully generated out of the consideration of various executory devises of terms, those to take effect on the death of some specified person being generally supported, while those which were to take effect on an indefinite failure of issue were held void[2]. The true principle[3], that the validity of an estate on condition precedent depends not on the character, but on the time of the contingent event, was at first rejected by almost the entire Bench, and won its way very slowly to judicial recognition[4]. At last, in 1681, the rule against perpetuities took definite shape, Lord Nottingham holding in the *Duke of Norfolk's* case[5], against the advice of the three chief justices and the express

[1] The policy of the common law against the creation of a perpetuity appears to have been first asserted towards the end of Elizabeth's reign (*Corbet's* case, 1 Rep. 83, 84 a, 88 a; 6 Rep. 40 a; 10 Rep. 42 b; Cro. Jac. 696-8) as a reason for holding void any device to restrain a tenant in tail from suffering a common recovery. This policy rests on the sound principle that the free power of alienation, which the law has annexed to every form of ownership, shall not be exercised to its own destruction; and it seeks accordingly to avoid all dispositions which tend to create a perpetuity, or to place property for ever out of reach of the exercise of the power of alienation inherent in ownership. The same principle had already been used in holding void attempts to impose a general restraint on alienation by the transferee of any property; Litt. s. 360. Mr. J. C. Gray maintains (Perp. § 140, p. 91) that the word *perpetuity* as applied to attempts to restrain the barring of an entail has a different meaning from that in which it is employed in speaking of the modern rule against perpetuities. In its original sense, he says, it meant an inalienable interest; its second meaning is an interest to arise on the fulfilment at a remote time of some condition precedent. He very truly says that much confusion might have been avoided if this distinction of meanings had always been clearly apprehended; in particular, the erroneous opinion expressed in *Gilbertson* v. *Richards*, 4 H. & N. 277, 297; 5 H. & N. 453, 458; *Avern* v. *Lloyd*, L. R. 5 Eq. 383, and *Birmingham Canal Co.* v. *Cartwright*, 11 Ch. D. 421 (now corrected in *London & South Western Ry. Co.* v. *Gomm*, 20 Ch. D. 562 and *Re Hargreaves*, 43 Ch. D. 401), that a contingent interest cannot be too remote, if limited to an ascertained person capable of alienating it. Still, while recognizing that the essence of the rule against perpetuities is the avoidance of interests contingent on the fulfilment at too remote a time of some condition precedent, I venture to submit that the reason why the limitation of such interests is prohibited is that they obstruct the exercise of the power of alienation *inherent in ownership*. It must be remembered that the common law does not recognize such interests either as ownership or even as present right; they were considered as mere *possibilities* of ownership, which could indeed be released for the benefit of the owner in possession, but were otherwise inalienable (10 Rep. 48). Those who might be entitled to such interests had not therefore the power of alienation inherent in ownership. The law regarded the interim possessors, pending the happening of the contingency, as the only true *owners*, and it was the obstruction of *their* power of alienation of which it was jealous. This obstruction equally occurs, whether a contingent interest be given to an ascertained or an unascertained person. The fact, that contingent interests might be released or might by statute be transmitted, is thus, for the purpose of the law's theory, irrelevant. I think that this consideration supplies the link which connects the policy of the law against a perpetuity as originally asserted with that made manifest in the evolution of the modern rule against perpetuities. See Fearne, C. R. 430; 1 Sand. Uses, 196; Lewis on Perpetuity, 164; *London & South Western Ry. Co.* v. *Gomm*, 20 Ch. D. 562.

[2] Gray, Perp. § 161 sq., pp. 107 sq.

[3] First formulated by Davenport, *arguendo* in *Child* v. *Baylie*, Palm. 334.

[4] Gray, Perp. § 160, p. 107.

[5] 3 Ch. Ca. 14, 2 Swanst. 454.

authority of *Child* v. *Baylie*[1], that the limitation over of a trust of a term of years might well be made to take effect upon an event, which must happen within the lifetime of a living person. This case is always referred to as having settled the rule against perpetuities in its first stage, allowing the duration of an existing life as the period within which the vesting of a contingent interest may be suspended.

But while this rule was thus definitely formulated, there is up to this date absolutely no trace in the books of any other rule restraining the creation of contingent remainders. We have the fact that they were held to be destructible, an obvious safeguard against perpetuity; and there is the supposed doctrine against double possibilities, which was rejected as above described; but that is all. And it is important to note that the doctrine against double possibilities, during its brief acceptance, had never been alleged to prohibit a limitation to the unborn child of an unborn person[2]. Such a limitation, if made to take effect after the expiration of a vested life estate, appears to have been unobjectionable at common law from the time when contingent remainders were first allowed. The earliest example of a valid contingent remainder is a limitation to *A* for life, remainder to the heir of *J. S.*, a living person[3]. Such a limitation is unquestionably valid. It is given by Lord Coke as an instance of a good limitation, one that may by common possibility take effect, in the very passage to which we owe the preservation of all his and Popham's peculiar notions about common and remote possibilities[4]. And yet *J. S.* may well die just before *A*, leaving his grandson or even his great-grandson his heir; and the heir will, in either case, be certainly entitled to take possession. The limitation to *J. S.*'s heir is therefore equal to a limitation to such person, whether son, grandson, or more remote descendant or collateral relation in however remote a degree, as shall at *J. S.*'s death be his heir. And this being so, it seems impossible to deny that a direct limitation, after a *vested* life estate, to the first grandson of *J. S.* (a bachelor) is valid[5].

In truth, while contingent remainders could only be limited of legal estates, and such remainders were destructible, there was not, and there was no need of a rule to restrain them from being limited to arise in a too remote futurity. Moreover, limitations to the

[1] 2 Rolle 129; Palm. 48, 333; W. Jones 15; Cro. Jac. 459.
[2] See above, p. 238, note 7. [3] Y. B. 9 Hen. VI. 24 a. [4] 2 Rep. 51.
[5] I have been surprised to find in a text-book of such deservedly good repute as Farwell on Powers, p. 286, 2nd ed., the statement that the old common law rule against double possibilities prevents the limitation of a legal estate in land to the unborn child of an unborn child of an existing person, citing *Whitby* v. *Mitchell*. I submit that there is nothing in that decision or elsewhere to authorize such a statement.

unborn as purchasers were a novelty[1]; and no doubt conveyancers began tentatively, and did not go beyond giving estates to the children of the living. It was not until contingent remainders had become practically indestructible, either by giving estates to trustees to preserve them, or by limiting them by way of a declaration of trust[2], that the danger of perpetuity really arose. Accordingly, the first case, in which a question was raised of the validity of successive life estates given to the unborn, was *Humberston* v. *Humberston* in 1717[3], more than thirty-five years after the rule against perpetuities had been established[4]. In that case there was a trust to convey to successive generations of unborn sons for successive life estates; and Cowper C. said that an attempt to make a perpetuity for successive lives was vain[5]. That is, he based his objection on the remoteness of the limitations[6].

The first suggestion, that the doctrine of the invalidity of successive contingent remainders to successive unborn generations is an independent rule, was made by Lord Northington in 1759, that is, seventy-eight years after the *Duke of Norfolk's* case[7], in his judgment in *Marlborough* v. *Godolphin*[8]. But he made no attempt to attribute this alleged rule to the doctrine against double possibilities[9]. The connexion of this doctrine with the limitation of an estate to the child of an unborn person, in remainder after a life estate to such unborn parent, was first made in certain casual remarks of Lord Mansfield C.J. and Wilmot J., uttered in 1765[10], more than eighty years after the rule against perpetuities

[1] See above, p. 239 and note 2.

[2] Here it must be remembered that according to the opinion of Professor Ames of Harvard University expressed and, I think, fully proved in the *Green Bag*, iv. 81, the Statute of Uses effectually put an end to simple trusts of land for about a century, and it was not until about 1634 and after that a simple trust was held enforceable in equity when declared of lands given to trustees, who took the legal estate under the Statute of Uses. The authorities cited by Mr. Ames are given in a note to the 18th ed. of Williams on Real Property, p. 172, n. (*t*).

[3] 1 P. W. 332. [4] Above, p. 240.

[5] So in *Seaward* v. *Willock* (1804), 5 East 198, 205, Lord Ellenborough C.J. said, 'The law will not allow of a *successive* limitation of estates for life to persons unborn.'

[6] Gray, Perp. § 193, p. 137. [7] Above, p. 240. [8] 1 Eden, 404, 415, 416.

[9] All that Lord Northington said was, 'It is agreed that the Duke of Marlborough could not have done this by limitation of estate; because though by the rules of law an estate may be limited by way of contingent remainder to a person not *in esse* for life or as an inheritance, *yet a remainder to the issue of such contingent remainderman as a purchaser is a limitation unheard of in law nor yet attempted as far as I have been able to discover.* Why the law disallowed these kinds of limitations I will not take upon me to say . . .' Mr. Gray submits (Perp. § 196, p. 139) that, historically, the correct explanation is given in the argument for the respondent, S. C. in Dom. Proc., 3 Bro. P. C. 232, 245:—'This arises from the policy of the law against perpetuities, that the vesting of the inheritance or ownership may not be suspended beyond the compass of a life or lives in being, or beyond the age of twenty-one of the first born tenant in tail, during whose infancy the law itself will restrain his power of alienation.'

[10] *Chapman* v. *Brown*, 3 Burr. 1626, 1634, 1635. Lord Mansfield said that such a limitation would be void; 'A possibility cannot be devised on a possibility.'

had been formulated, and the doctrine against double possibilities rejected[1]. But even then, the vague expressions so used were not considered to furnish any other reason than remoteness for the invalidity of the limitation[2]. The true source of the error promulgated in *Whitby* v. *Mitchell* appears in 1768 in a somewhat confused opinion of Mr. Booth, which he afterwards acknowledged to have been written when he was in the country and extremely engaged[3]. In this he not only stated that a limitation to the first son of an unborn tenant for life is a possibility upon a possibility, but also asserted that *the possible children of unborn children are such as the law will not expect*! The unsoundness, nay, the utter rottenness of this proposition is exposed by what has been said above[4] as to the validity of gifts to a man's issue or descendants. But what a wanton perversion is here of the doctrine against double possibilities[5]! In the name of our common humanity, why should a man's issue be expected to fail after the first generation? Are not our offspring of like passions with ourselves? Words fail to express our abhorrence of the monstrous unreason of Mr. Booth's supposition. There was no need for him to tell us that his opinion was of the kind that is produced 'in the country'; it is evident that he had come under the spell of the wood-nymphs. The piping of the great god Pan must have charmed him till he spake with the spirit of Dogberry and of Bumble; for to formulate such a doctrine as his is indeed to write down the law an ass[6]. Surely our common law is undeserving of this insult! It takes due notice of natural phenomena, and favours the lawful propagation of the race. Has it not rejected all conditions in general restraint of marriage as 'repugnant to the original institution of the creation of mankind'[7]?

Here then is the real origin of that fantasy, which in *Whitby* v.

Wilmot J. said, 'You cannot limit a non-entity upon a non-entity, a possibility upon a possibility.'

[1] Above, p. 236, note 6, and p. 240.

[2] This, Mr. Gray points out (Perp. § 197, p. 140), is shown by the successful argument for the defendants in error, S. C. in Dom. Proc., 3 Bro. P. C. 269, 275, showing that the intention of the testator could not take effect; 'as it would establish a limitation of a possibility upon a possibility *and manifestly tend to a perpetuity, by a suspension of the inheritance from vesting, and consequently render the estate inalienable for a longer time than the policy of the law allows, which has not yet been suffered to continue longer than a life or lives in being and twenty-one years beyond.*'

[3] 2 Cases and Opinions, 432, 437.

[4] Pp. 234, 237.

[5] As we have seen, even Lord Coke admitted the birth of issue of an ascertained living person, in however remote a degree, to be a common possibility; above, p. 241. And when he says that a gift to the heirs of *J. S.* is bad, as a remote possibility, if there be no such person as *J. S.* at the time of the gift, he has no meaning beyond that the gift is *void for uncertainty*. See 1 Prest. Abst. 128, 129, 2nd ed.

[6] 'If the law supposes that,' said Mr. Bumble, 'the law is an ass'; Oliver Twist, ch. 51.

[7] *Per* Comyns C.B., *Harvey* v. *Aston*, Com. 726, 729; see Law Quarterly Review, xii. 36.

Mitchell Lords Justices Cotton and Lindley confidently pronounced to be an old rule existing long before the rule against perpetuities, and which Lord Justice Lopes boldly declared to be 'an old rule *originating out of the feudal system*[1]!' Its subsequent history may be easily traced. Mr. Booth's perverted application of the rejected rule against double possibilities was adopted by Mr. Yorke in a subsequent opinion on the same case[2]; and an unhappy publicity was given to these opinions by their being included in a collection of cases and opinions printed in 1791. Mr. Booth's eminence as a conveyancer led Mr. Charles Butler in his notes to Fearne's Contingent Remainders[3], also to refer the invalidity of a remainder to the child of the unborn, after a life estate to the parent, to the cases of a possibility on a possibility; although in his notes to Coke upon Littleton[4] he pronounced such a limitation to be invalid, *because it suspends the inheritance from vesting beyond the period allowed by law.* Lord St. Leonards' respect for Mr. Booth and Mr. Yorke caused him to absorb their unsound notions on this matter; with the result that though he clearly perceived and pointed out[5] that such a limitation is void, as tending to a perpetuity, independently (as he said) of the technical objection of its being a possibility on a possibility, yet he was led into the historical error that this objection was really an old rule of law[6]. Mr. Jarman[7] and, ultimately, Mr. Joshua Williams followed the same lead[8]. The reputation of all these gentlemen is deservedly great; their eminence in the profession is undisputed. But no lawyer is always right; and there is no more wit in adopting an absurd proposition out of respect for an illustrious predecessor than is observed in a procession of sheep escaping through a gap. I submit that it is proved that the only link between the doctrine of double possibilities and the invalidity of the limitation in question is Mr. Booth's statement that the possible children of unborn children are such as the law will not expect. And if this be not law, as it certainly is not, the chain of connexion is broken, and the weight of all Mr. Booth's respected compurgators is nullified.

The reader will have observed how Mr. Charles Butler, Lord St. Leonards', and Mr. Jarman, though they handed on Mr. Booth's mistake, nevertheless distinctly referred the invalidity of the limi-

[1] What a travesty of legal history is this!
[2] Cases and Opinions, 440.
[3] Pp. 502, 565, 9th ed.
[4] 271 b, n. (1), vii. 2.
[5] Sug. Gilb. Uses, 268, n.; Sug. Pow. 393, 8th ed.
[6] Sug. Pow. 2, 8th ed.; 4 Dru. & War. 32.
[7] 1 Jarm. Wills, 221, 1st ed. Note that Mr. Jarman also pronounced such a limitation as is in question to be void, *because the object of the gift may not come into existence until more than twenty-one years after a life in being*; 239, 240, 1st ed.
[8] Real Prop. 276, 13th ed.

tation in question to its want of conformity with the rule against perpetuities. But it is not generally known that Mr. Joshua Williams himself also expressed two opinions as to the rule determining the validity of successive contingent remainders. In the first edition of his treatise on Real Property [1], published in 1845, during the temporary abolition of contingent remainders by Stat. 7 & 8 Vict. c. 76, we find the passage transcribed below. It is noteworthy that it follows immediately after the remarks, exposing the absurdity of the supposed general doctrine against double possibilities, which have remained unaltered in all subsequent editions of his work [2].

'But, although the doctrine of Lord Coke, that there can be no possibility on a possibility, ceased to govern the creation of contingent remainders, before their recent abolition, there was yet some rule by which these remainders were restrained within due bounds, and prevented from keeping the lands which were subject to them, for too long a period beyond the reach of alienation. This rule is the second rule, to which we have referred; and what the precise nature of this rule is, has been the subject of much controversy. Some writers suppose, that the rule in question was no other than that by which executory interests are confined; and by which, as will appear in the next chapter, executory interests are prohibited from placing lands beyond alienation, for a longer period than the lives of existing parties, and twenty-one years after the decease of the survivor, including further the period of gestation, should gestation exist [3]. In support of this view, the concurrent origin of contingent remainders and executory interests, hitherto apparently unnoticed, would afford perhaps one of the strongest arguments. But the opinion of the elder lawyers of modern times would seem to have been in favour of a rule apparently derived from, and analogous to, the old doctrine which prohibited double possibilities. It is true, that a clear statement of the rule is not to be found; almost all that is given is one single example, which is frequently reiterated, and is as follows:—That an estate cannot be given to an unknown person for life, followed by any estate to any child of such unborn person [4]; for in such a case, the estate given to the child of the unborn person is void. From this example it is by no means easy to extract a rule; and, now that contingent remainders can no longer be created, there will soon cease to be occasion for any rule on the subject.'

This, it is submitted, was an eminently judicious view of the question. The writer was then at the most vigorous period of his

[1] Pp. 211, 212.

[2] Pp. 276-7, 13th ed.; 339-341, 18th ed.

[3] 'See Lewis on Perpetuities, 408 et seq., in which this view of the question is ably advocated.' (Mr. Williams's own note.)

[4] Citing 2 Cases and Opinions, 432-441; *Hay* v. *Earl of Coventry*, 3 T. R. 83, 86, 1 R. R. 652; *Brudenell* v. *Elwes*, 1 East. 442, 452, 6 R. R. 310; Fearne, Con. Rem. 502, 565, Butl. note; 2 Prest. Abst. 114; 1 Sug. Pow. 493; 1 Jarm. Wills, 221.

genius; he was fresh from the study of the authorities and from original research in the history of contingent remainders. Remark how his judgment inclines towards the view advocated in 'the able argument' of Mr. Lewis rather than 'the opinions of the elder lawyers of modern times.' He mentions Mr. Lewis's view first, and shows that it is supported by the true history of contingent remainders, which he was the first to elucidate[1]. Observe too how clearly he points out that the proposition commonly laid down is no rule, but a single example only. If the question is to be decided, as it really was in *Whitby* v. *Mitchell*, by the authority of conveyancers and text-writers, as such, I submit that Mr. Williams's earlier view must be considered as well as his later, and that due account should be taken of Mr. Butler's, Lord St. Leonards', and Mr. Jarman's statements in favour of contingent remainders being governed by the rule against perpetuities.

Fortified by the lucid accuracy of Mr. Williams's first judgment in the matter, we will proceed with our criticism of his second opinion, that adopted in *Whitby* v. *Mitchell*. This was first expressed in the third edition of his book published in 1851; and he adhered to it in all subsequent editions[2]. He there maintained that the rule, afterwards adopted in *Whitby* v. *Mitchell*, was a rule 'apparently derived from the old doctrine, which prohibited double possibilities . . . and more stringent than that which confines executory interests.' As to his derivation of this alleged rule, that, I submit, must fall to the ground upon consideration of the historical authorities and upon the refutation of Mr. Booth's monstrous hypothesis, that the law does not expect that children, yet unborn, will in their turn have issue. The authorities cited by Mr. Williams for his second opinion were Mr. Booth's pronouncement and the passages where it was blindly adopted; a bare statement from an opinion of Mr. Fearne[3], without giving any reason, that 'an estate for life may be limited to the unborn child of a person *in esse*, but the limitation to their first and other sons is void'; three judicial *dicta*; and the case of *Cole* v. *Sewell*. Of these *dicta*, the first two are of Lord Kenyon C.J., one merely stating that 'an estate for life may be limited to unborn issue, provided the devisor does not go farther and give an estate in succession to the children of such unborn issue[4]'; the other simply alleging the invalidity of a

[1] Mr. Joshua Williams is entitled to the merit of being the first to point out the comparatively late introduction of contingent remainders. In doing so, he relied on his own historical researches, against the opinion of the elder lawyers; see Real Prop. 202, n., 1st ed.; 265, n., 13th ed.; 331, n., 18th ed. I have heard from his own lips how he felt that he was uttering what would be regarded as an abominable heresy in penning such a statement. But his statement is now generally accepted.

[2] See pp. 227, 406, 3rd ed.; 276, 531. 13th ed. [3] Posthuma, 215.

[4] *Hay* v. *Earl of Coventry* (1789), 3 T. R. 83, 86, 1 R. R. 652, 653. The decision was

limitation to the children of an unborn child as purchasers *after* a limitation to such unborn child for life [1]. Here is certainly no rule, but a single example only, as Mr. Williams himself pointed out [2], of a limitation obviously void for remoteness. The third *dictum* was of Lord St. Leonards [3]; it is a bare statement, applied to a case of the devise of an *equitable* estate tail to the son of an unborn person in remainder after an equitable life estate to the parent, that the rule of law forbids the raising of successive estates by purchase to the children of unborn children. It has been shown [4] that such limitations were held void as tending to a perpetuity. It is therefore to be presumed that the rule against perpetuities is that to which Lord St. Leonards was here alluding. And there is certainly no word in the judgment in *Monypenny* v. *Dering* justifying its citation in support of the proposition that successive remainders to the children of the unborn are void as a possibility on a possibility. In *Cole* v. *Sewell* [5] there are certainly *dicta* of Lord St. Leonards [6] and also of Lord Brougham [7], that no question of remoteness can arise with regard to a contingent remainder; but these were uttered with reference to the case before them, which was that of a contingent remainder limited to take effect after a *vested* estate [8]; and all that was decided was that there can be no question of remoteness with regard to a contingent remainder limited to take effect after an estate tail. There is nothing in this decision to prevent the application to contingent remainders of the rule against perpetuities, as executory limitations subsequent to or in defeasance of an estate are an established exception to that rule [9], on the ground that such limitations can always be defeated by barring the entail [10].

that estates given to the unborn daughters of a living person, without proper words of inheritance, conferred life estates only.

[1] *Brudenell* v. *Elwes* (1801), 1 East 442, 452, 6 R. R. 310. The decision was that a power to appoint amongst children was not well exercised by an appointment to grandchildren.

[2] Above, p. 245.

[3] In *Monypenny* v. *Dering* (1852), 2 De G. M. & G. 145, 170.

[4] Above, p. 242.

[5] (1843) 2 Conn. & Laws. 344, 4 Dru. & War. 1; 2 H. L. C. 186.

[6] 2 Conn. & Laws. 359; 4 Dru. & War. 28. Lord St. Leonards's remarks cannot possibly be applied to a contingent remainder after a contingent remainder; or they would be quite contrary to what he wrote in Sug. Pow. 393, 8th ed., see above, p. 244.

[7] 2 H. L. C. 230.

[8] Contingent remainders after vested estates are in a different case from those limited in remainder after a contingent remainder. If the vested estate be in tail, there can be no question of remainders, as held in *Cole* v. *Sewell*. If the vested estate be for life, the contingent remainder falls automatically within the rule against perpetuities. At common law, it must vest, if at all, within the lifetime of the tenant for life; as otherwise it will fail for want of support, as it is called. See below, p. 251.

[9] *Nicolls* v. *Sheffield* (1787), 2 Bro. C. C. 215; *Phillips* v. *Deakin* (1813), 1 M. & S. 744.

[10] Fearne, C. R. 423; *Milbanke* v. *Vane*, 1893, 3 Ch. 79.

The real reason why Mr. Joshua Williams changed his mind seems to have been his perception that the application of the rule against perpetuities to contingent remainders would increase the time during which land might be tied up in settlement for at least a generation longer than was possible under the usual mode of settlement. And this, no doubt, is also the real reason why Mr. Williams's second opinion was so eagerly followed in *Whitby* v. *Mitchell*; the judges were afraid of increasing the time of possible settlement. It is submitted, however, that this consequence, the contemplation of which so alarmed Mr. Williams and the judges, simply results from the arbitrary extension in 1833, by the decision in *Cadell* v. *Palmer*[1], of the period given by the rule against perpetuities to twenty-one years longer than the time originally allowed, namely, the duration of existing lives[2]. The modern settlement of land on living persons for life, with remainder to their unborn sons in tail, though placed on a firm foundation about the middle of the seventeenth century[3], was not fully developed until after the rule against perpetuities had been laid down in 1681 as permitting the creation of contingent interests which must vest before the expiration of existing lives[4]. I submit that it is this rule which the conveyancers of the eighteenth and early nineteenth centuries had in view when they framed the limitations of a settlement. Remainders to the unborn children of a living person, after a life estate to the parent, must necessarily vest in the lifetime of the living[5]; it is otherwise where a remainder is limited, after a life estate to an unborn person, to his child. And for that reason, it is submitted, conveyancers took it as a working rule, that such limitations were void, and eschewed them. Mr. Fearne expressly says[6] that the constant practice of limiting an estate tail to the first and other sons in marriage settlements is founded on the principle that every limitation in future, which in its nature tends to a perpetuity, is void; and shows that limitations in remainder to the children of the unborn were avoided on this ground.

Historically then, the usual limitations of the modern settlement of land were moulded by conveyancers working for the most part under a well-ascertained rule against perpetuities, which permitted the suspension of vesting during existing lives and accidentally admitted of the further suspension of the power of alienation

[1] 7 Bli. N. S. 202. [2] Above, p. 241. [3] Above, p. 239.

[4] The development of the modern settlement by the addition of powers of sale and other powers now usual appears to have been the work of the eighteenth century; see Co. Litt. 290 b, Butl. note (v. 4, 5); Bridgman's Prec. Conv. (3rd ed. 1699), 130, 148, 171, 332; Lilley's Practical Conveyancer (1719) 568; 2 Horsman's Conveyancing (1744) 217, 475; 3 Wood's Conveyancing (3rd ed., by Powell, 1793) 641; 7 Barton's Conveyancing (3rd ed. 1824), 248; 3 Davidson, Prec. Conv. (3rd ed., 1873) 263–9.

[5] Above, p. 247, note 8. [6] C. R. 502, 9th ed.

during the minority of any one acquiring a vested interest in due time, but as an infant. So long, therefore, as the rule against perpetuities stood fast at the period of existing lives and the time of the minority of some person actually entitled [1], the usual limitations of a settlement made by way of legal contingent remainder corresponded with those which might be made by executory devise or declaration of trust; and it could not be truly said that the rule affecting legal contingent remainders was more stringent than that governing executory devises [2]. But when it was suddenly held that the suspension of vesting might be deferred, without breaking the rule against perpetuities, for an independent term of twenty-one years longer, the ordinary limitations of a modern settlement were apparently left behind. They were drawn in conformity with the original rule. But by 1833 both settlors and conveyancers were well used to the regular form of settlement, which answered all practical purposes. There is therefore no ground for surprise that limitations attempting to secure the full advantage of the extended rule against perpetuities—such limitations as were given in Mr. Williams's appendix and are set out above [3]—are unknown in practice. And as Mr. Gray points out, such limitations are quite unknown of personal or equitable estate as well as of legal estate in land. Mr. Williams's attempt to argue [4] the existence of a prohibitive rule from the non-existence of such limitations must therefore fail. He admitted them to be valid of estate subject only to the rule against perpetuities. In the case of such estate therefore no prohibitive rule can be inferred from the non-existence of the limitations. So also in the case of legal contingent remainders.

Mr. Gray has well pointed out [5] that Mr. Williams's proposition

[1] See *Stephens* v. *Stephens* (1736), Ca. t. Talb. 228.

[2] This is proved by Mr. Thellusson's will made in 1796. If any man ever wished to tie up his property for the longest period allowed by law, he did. Yet he durst go no further than the duration of existing lives; see *Thellusson* v. *Woodford*, 4 Ves. 227.

[3] P. 235.

[4] Mr. Williams's argument was that if such limitations as are set out above (p. 235) were valid of legal estates, it is to be presumed that they would have been adopted; and that the best evidence of such a settlement being illegal was that no conveyancer ever heard of such a draft being drawn: Real Prop., App. p. 406, 3rd ed.; 531, 13th ed.; 632, 18th ed. The truth is that neither the professional nor the lay mind has ever yet assimilated the fact that the decision in *Cadell* v. *Palmer* really added a further term of twenty-one years to the time of the duration of existing lives and of the years (which might be twenty-one) of the minority of some beneficiary, which was throughout the eighteenth century the utmost limit of possible settlement. It would require a very rare combination of circumstances to produce a settlement taking the utmost advantage of that decision. It could only be done by skilled lawyers carrying out the instructions of a settlor infected in an unusual degree with the idea of a prolonged settlement, and stubborn enough to combat the objections which his advisers would certainly raise. Mr. Thellusson's case seems to show that when a man is bent on long settlement, he will not run too great risks, but prefers a safe limit; see above, note 2.

[5] Perp. §§ 292-3, p. 209.

(adopted in *Whitby* v. *Mitchell*) is utterly insufficient as a rule. It does not prohibit a limitation, in remainder after a life estate to the first son to be born to *A*, to the first son of the first son to be born to *B*, or a limitation, after successive life estates to *A*'s unborn sons, to the last survivor of them in fee. Yet no one will pronounce either limitation good. The insufficiency of the rule in *Whitby* v. *Mitchell* in the latter respect was proved in the very year of its decision by the case of *Re Frost*[1], where a testator had devised land to his unmarried daughter for life, remainder to any husband whom she might marry for life, remainder to the daughter's children, *who should survive the daughter and her husband*. Kay J. held the remainder to such children void, if not as a possibility on a possibility[2], then as breaking the rule against perpetuities.

I think it is not to be expected that any judge will abandon the ground so taken in *Re Frost*. Nothing tending to extension of the time of settlement is now likely to meet with judicial favour. And as *Re Frost* plainly showed that cases not to be settled by the decision in *Whitby* v. *Mitchell* may arise, it seems extremely improbable that the safeguard of the application to successive contingent remainders of the rule against perpetuities will ever be thrown away. And it is to be hoped, for every reason, that if ever a case like *Whitby* v. *Mitchell* shall occur again, the decision there given may be overruled, and the rule against perpetuities established as the only rule governing the creation of all estates subject to a condition precedent. If, as has been shown to be the case[3], there is no rule of law forbidding the limitation of a legal estate to the child of an unborn person *per se* (such a limitation being good in remainder after a vested estate), then the whole point of the proposition adopted in *Whitby* v. *Mitchell*[4] is that such a limitation is void if made in remainder *after* a life estate to an unborn person[5]. We then ask, why is such a limitation so made to be held void? It cannot, I submit, be answered, without giving any reason, that there is an old rule of law, established before the rule against perpetuities, which makes such limitations void. For this is untrue; there is no trace of authority for the existence of any such rule[6]. Nor can it be answered that the limitation is void because the possibility of there being children of unborn children is a double possibility, which is against law and void. The law will clearly

[1] 43 Ch. D. 246.

[2] As shown above, p. 237, note 6, he took this ground also; but surely that reason cannot possibly stand.

[3] Above, pp. 234, 237, 241.

[4] Above, p. 235.

[5] It is obvious that this is the point of the *dicta* given above, pp. 246, 247, which were the only authorities referred to in the judgment in *Whitby* v. *Mitchell*.

[6] Above, pp. 238–244.

contemplate such a possibility, as has been abundantly shown [1]. We are then left to the conclusion that the limitation in question is void because the vesting of the estate given may be postponed till the expiration of the life of an unborn person, which is too remote a time. But surely to admit this is to allow the limitation to be subject to the rule against perpetuities; for that is the rule which makes void estates subject to a condition precedent to be fulfilled at too remote a time. If so, the limitations in *Whitby* v. *Mitchell* should, I submit, have been held valid; for they must have vested in the settlors' lifetime, and so did not break this rule. I will only add that the objection that to overrule *Whitby* v. *Mitchell* would increase the possible time of settlement is not real, but only apparent; for if such limitations as are given above [2] are good of an equitable estate, of what avail is it to hold them void of a legal limitation [3]? Surely this ought not to weigh against the advantage of finally rejecting the nonsense (for it is nonsense) about double possibilities and establishing one rational and uniform principle.

Mr. Firth's contribution to this controversy appears to be that *Abbiss* v. *Burney* [4] shows that there is a difference between contingent remainders of legal and of equitable estates. There is: but not, I submit, such as to prevent the application of the rule against perpetuities to both of them. In *Abbiss* v. *Burney*, a remainder, after a life estate to *A*, to *B*'s first son who should attain twenty-five, was held void, when made of an equitable estate: though it was admitted that it would have been good, if made of a legal estate. But this is because, at common law, all contingent remainders to take effect after a vested life estate must necessarily vest, if at all, before or at the determination of the life estate; that is, they must vest within the duration of an existing life, and so they conform to the original rule against perpetuities [5]. A limitation of a legal estate, after a life estate to *A*, to his first son who

[1] First, there is no rule against double possibilities prohibiting the limitation of an estate subject to condition precedent on the happening of more than one event; above, pp. 236, 237. Secondly, accepting for a moment Coke's doctrine against a remote possibility, the birth of issue of a living person in however remote a degree is a common possibility only; above, p. 241. Thirdly, the only authority for applying the rejected doctrine of double possibilities to the likelihood of the birth of issue in the second degree is Mr. Booth's opinion written in the country and resting on a proposition flatly contradicted by the recognized validity of gifts to unborn issue or descendants; above, pp. 234, 237, 243.

[2] P. 235.

[3] Under the present law, when a *cestui-que-trust* can assert his right to possession in all Courts, and equitable tenants for life have all the powers given by the Settled Land Acts, it would make no practical difference to beneficiaries under a settlement of land that the legal estate was vested in trustees. The trustees would have no opportunity of conveying the lands to a purchaser for value without notice of the trust; as the trust would appear on the face of the conveyance to them; and if the trust were a simple trust, the tenants for life would be given the custody of the title deeds.

[4] 17 Ch. D. 211.

[5] See above, p. 247, note 8.

shall attain twenty-five is therefore equivalent to a gift to *A*'s first son who shall have attained twenty-five at *A*'s death. But in the case of equitable estates, there is no such necessity for the remainder to vest before the life estate expires. Hence the difference. It is submitted that *Abbiss* v. *Burney* does not furnish any reason why successive contingent remainders—those to take after a contingent estate—should not be subject to the rule against perpetuities.

I cannot conclude this article without acknowledging my obligation to the extremely able criticism of *Whitby* v. *Mitchell* made in the pages of this REVIEW by Mr. J. Savill Vaizey[1]. I read Mr. Vaizey's article with the keenest interest when it first appeared, and it was through his remarks that I first became acquainted with Mr. Gray's admirable treatise and studied the subject in the original authorities[2].

T. CYPRIAN WILLIAMS.

[1] L. Q. R. vi. 410.

[2] The editor of this REVIEW, in a note to Mr. Firth's article, quotes the late Mr. Challis's opinion, that the argument from history is conclusive against the application of the rule against perpetuities to legal limitations in remainder (Challis, R. P. 183, 184, 2nd ed.). But Mr. Challis adopted the historical view 'that the rule against perpetuities was framed upon the analogy of the ascertained effect of the rules applicable to legal limitations by way of remainder.' And he said that 'all the authorities concur in this tradition.' Mr. Gray, however, has, I think, conclusively shown that this tradition is a popular error, resting chiefly on the remarks of Lord Kenyon C.J. in *Long* v. *Blackall* (1797), 7 T. R. 100, 102, which are entirely unsupported by the facts; Gray, Perp. §§ 198, 199, pp. 141, 142. Nor can we accept Mr. Challis' statement, if made of *contingent* remainders, that 'legal limitations had flourished *for four or five hundred years*, and the rules applicable to them had, during this time, been discussed with the greatest assiduity, before the rule against perpetuities had ever been heard of.' Mr. Challis did not support this statement by any evidence. The late origin of contingent remainders and still later emergence of limitations to unborn sons has been established by the researches of Mr. Joshua Williams; above, pp. 238, 246; and Mr. Gray has shown that the alleged independent rule, as to the invalidity of a remainder to the child of an unborn person after a life estate to the parent, first originated in 1759, seventy-eight years after the rule against perpetuities had been settled; above, p. 242. Mr. Gray has also shown the rule against perpetuities to be a common law rule evolved in consideration of common law interests, viz. executory devises of terms; above, p. 239. The rule cannot therefore be treated, as Mr. Challis proposed to treat it (R. P. 175, 2nd ed.), merely as a doctrine applied in the interpretation of the Statutes of Uses and of Wills.

THE LAW OF QUASI-CONTRACT[1].

THE subject which we are to study together this year is Quasi-Contract. The term itself is of recent introduction into the nomenclature of our law. In the edition of 1876 of Bouvier's Law Dictionary you will find it set down as a term not of our own, but of the civil law. In my opening lecture last year I endeavoured to set forth before you in an elementary way the meaning of the terms law and contract. After having adopted as a definition of law the language of Sir Frederick Pollock, that it is that body of 'rules recognized and administered in a commonwealth and under its authority as binding on its members,' I proceed as follows :—

The body of rules which, as we have defined it, constitutes the law has for its subject-matter rights and duties. These are correlative parts of a single whole.

If *A* makes a loan to *B*, *A* has a right to re-payment, and *B* is under a duty to re-pay. I have a right to the peaceable possession of my house ; it is the duty of everybody to refrain from invading it against my will. I have taken these two examples because they illustrate the division of rights and duties into two great classes. Certain rights exist in favour of the individual against all mankind; looked at from the other aspect, the corresponding duties are owing by all mankind. Thus it is my right that no man shall assault me, that no man shall slander me, that no man shall break my windows. These are rights I have against the world, and the corresponding duty of refraining is a duty imposed upon all.

Certain other rights exist only against a determinate person or determinate persons. Thus a child of tender years has a right to be supported by its parents, but it can claim that right from no one else ; looked at from the other aspect, the parents of a minor child owe it the duty of support, but other persons owe it no such duty. A suitor in court has a right to have the sheriff serve the defendant with summons, but he has no such right against any one else, and no one else is under a duty to serve such summons.

If *A* holds property in trust for *B*, *B* has a right against *A* to have the trust properly carried out ; but *B* has no such right against mankind in general. The duty owed to *B* is one owed not

[1] An introductory lecture delivered by Gustavus H. Wald in the Law Department of the University of Cincinnati. (By permission of the Weekly Law Bulletin.)

by everybody, but by *A* alone. This distinction of rights into these two great fundamental divisions was made by the Roman lawyers, who called those rights which avail against mankind in general rights 'in rem'; and those which avail only against certain determinate persons rights 'in personam certam,' abbreviated to rights 'in personam.'

I know of no distinction more important and more useful as an aid in the acquisition of legal methods of thought, and as well in the solution of many controverted questions of law, than this fundamental division of rights into rights against the individual and rights against the world. Discuss this distinction among yourselves and test its application until you have mastered it and assimilated it to your mental habit, so that its use becomes as natural to you as your use of the alphabet or the multiplication table.

This division enables us at once to ascertain to what field in the entire domain of law contract belongs. A contract always gives rise to a right or rights 'in personam' against a certain determinate person or determinate persons; it never gives rise to a right 'in rem'—that is, to a right against the world.

If *A* loans money to *B*, this gives *A* the right to call upon *B* for its re-payment. He has this right as against *B* and no one else. If *A* rents his house to *B*, *A* has a claim upon *B*, but upon no one else, for the rent. If *A* agrees to sell his horse to *B* for one hundred dollars, and *B* agrees to pay *A* that sum for the horse, *A* has the right against *B* to claim the price, and *B* has the right against *A* to claim the animal. They have these rights against each other reciprocally, but not against any one else. The transaction does not invest either of them with any right against mankind in general. Without multiplying illustrations, it is impossible to state a contract which does not give rise to a right against a determinate person, and equally impossible to state one which gives rise to rights against the world.

But because a contract always creates a right in personam, it does not follow that rights in personam are created by contracts alone. We have already seen that a minor child has a right in personam against its parents, the right to support; that a beneficiary under a deed of trust has a right in personam against his trustees to have the trust carried out; that a plaintiff in a suit has a right in personam against the sheriff to require him to serve summons on the defendant; and such illustrations might be multiplied indefinitely.

None of these rights flows from contract. The plaintiff and the sheriff may never even have heard of each other. The right of the

child against the parent for support is coeval with its birth. The deed of trust under which a beneficiary claims may have been executed a generation before the beneficiary was born. Plainly these rights are not the creatures of contract between these respective parties. They exist by virtue of other rules of law.

What then is it which distinguishes the rights in personam flowing from contract from all other rights of the same class? it is this: The right flowing from contract is always created by the voluntary act of the parties between whom it exists; by their own voluntary act the right is made to inhere in the one, and the duty is imposed upon the other. The act which creates the right and imposes the duty is always a promise. But the characteristic mark of quasi-contractual rights and duties is that they are not created by the voluntary act of the parties: not only are they not the result of a promise, of the expressed will of the party bound, but often, if not indeed always, they exist distinctly and emphatically against the will of the party bound. The obligations, for instance, of one to whom money has been paid by mistake of fact to refund it; of the county treasurer to re-pay illegal taxes collected by duress and against the protest of the party paying; of a divorced husband to pay for the support of his children of whose custody he has been deprived; of a judgment debtor to pay the judgment, the entering of which he may have contested to the very limit of his power, are all obligations imposed against the will of the party bound. In this feature they resemble the obligations the violation of which constitutes a tort. But, on the other hand, they differ from such obligations in radical respects. A right, the violation of which constitutes a tort, is a right to non-action, to non-interference; the right to be let alone; the right not to be slandered, assaulted, injured in one's person or estate. The corresponding duty is a negative one: the duty to refrain. But a quasi-contractual right is a right to demand of the other party not non-action, but action-performance; and the corresponding duty is not that of refraining but of doing. And further a right, the violation of which constitutes a tort, is always a right in rem, one that avails against mankind in general; while a quasi-contractual right is a right in personam, one availing only against a certain person or certain defined persons. In the old nomenclature of our law there was no term for rights and duties of this kind, although their existence was recognized. Before Austin's time there had been no serious attempt to make a category of legal rights and duties. English lawyers looked first not to the antecedent rights of parties, but to the remedies by which the rights, whatever their nature, might be enforced, and then, reasoning backwards, said that

the character of a right is determined by the nature of the remedy which the law of procedure affords for its vindication. Inasmuch as, in the very nature of things, rights must precede even the occasion for remedies, and inasmuch as the law gives full recognition to some rights for which any active remedy is denied, as, for instance, the rights of a party under a contract unenforceable under the Statute of Frauds, or by reason of the Statute of Limitations, this was of course thoroughly illogical.

Now, apart from real actions, and actions for the recovery of specific property, remedial rights at law were divided into two classes; remedies ex contractu and ex delicto, remedies 'sounding in contract' and 'sounding in tort.' The very constitution of our nature as human beings renders the recognition of quasi-contractual rights and duties inevitable, and remedies had to be afforded for their enforcement in one or the other of these two classes. Neither class clearly applied. The remedy ex delicto—in tort—was not applicable, for there was no violation of a right in rem, nor of the negative duty of refraining. The remedy ex contractu—in contract—was not applicable, for although there had been a violation of a right in personam, and of the affirmative duty of doing, there had not only been no promise (the distinctive mark of a contract), but the obligation violated was one forced upon the obligor against his will.

The courts solved the difficulty in their usual manner by resorting to a bold fiction; 'content to rest in a compromise between the forms of pleading and the convenience of mankind,' they said that inasmuch as the obligor in a quasi-contractual obligation is bound to the performance of the duty imposed upon him, we shall conclusively presume that he promised to perform it, and on this indisputably assumed promise he is liable ex contractu. As a matter of pleading this may have been well enough, but the fiction thus invented has been the source of no little confusion in our substantive law. It gave rise to the term 'a contract implied in law,' and this term has led many courts and commentators to overlook the distinction between contracts implied in fact and so-called 'contracts implied in law.' If a man gets upon a street car there is a contract implied in fact to pay the fare. The running car is an offer to carry him at the usual price, and his boarding it is as much a promise to pay that fare as if he had promised the conductor in so many words. So if I go into a restaurant and order and eat a meal, my conduct is a promise to pay for it, as effective as if I had made a written promise before being served. I may promise either by word or by act; both are mere methods of communication. A promise implied in fact differs in its essence in no way from

a promise uttered or written in words. There is no difference between the nature of the promises, though there may be a difference as to the evidence by which they can be proved.

The contract here is one based on the expressed consent of the parties. But to assert that by a conclusive presumption, by a 'contract implied in law,' persons have contracted in spite of their intention not to contract, is simply 'to say the thing that is not.' And yet this erroneous conception is frequently met with. To cite a single and classical instance, Blackstone says, vol. iii, p. 160:

'It is a part of the original contract entered into by all mankind who partake the benefits of society to submit in all points to the municipal constitutions and local ordinances of that state of which each individual is a member. Whatever, therefore, the laws order any one to pay, that becomes instantly a debt, which he hath beforehand *contracted* to discharge.'

Nothing could better illustrate the confusion incident to the notion of 'contracts implied in law.' For the inevitable meaning of the passage is that if I commit any tort for which I am answerable in damages, I can be held not only on the ground that I have done that wrong for which I never intended to make reparation, but on the ground that, contrary to the fact, I had beforehand *contracted* to make the damages good.

This, in its last analysis, would simply be to make all rights and obligations contractual; a *reductio ad absurdum*.

Quasi-contractual rights recognized and enforced by actions at law (and I use the words 'at law' as distinguished from 'in equity,' thus eliminating the entire subject of trusts, for they are cognizable only in equity) may be subdivided into those founded:

(1) Upon a record.

(2) Upon a statutory or official or customary duty, or a duty flowing from the domestic relations.

(3) Upon the doctrine expressed in the maxim, 'Iure Naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem.' By the law of nature it is right that no man shall enrich himself unjustly at the expense of another.

This is, with a slight modification, the subdivision first made by Prof. Ames in his article on the History of Assumpsit, 2 Harv. Law Rev. 53, 64, and adopted by Prof. Keener in his treatise on Quasi-Contracts. Prof. Holland's category is somewhat different: he divides the rights in question into four classes—the Domestic, the Fiduciary, the Meritorious, and the Official.

A judgment for money damages is commonly stated to be

a contract of record, and yet so long ago as the case of *Bidleson* v. *Whytel*, 3 Burrow, 1545, 1548 it was held by Lord Mansfield, after great deliberation and after consultation with all the judges, that 'a judgment is no contract nor can be considered in the light of a contract; for iudicium redditur in invitum.' So in respect of liabilities imposed by statute the court of appeals of New York, in *McCoun* v. *R. R. Co.*, 50 N. Y. 176, 180, says:

'A contract is a drawing together of minds until they meet and an agreement is made to do, or not to do, some particular thing. It may be express or it may be implied, or inferred from circumstances, and this implication is but the result of the ordinary and universal experience of mankind. If *A* borrows money of *B*, the courts may imply a promise to repay the money, for the universal experience is that in such a case a promise is exacted and made. An implied promise or contract is but an express promise proved by circumstantial evidence. It is quite distinct from that fiction by which a statute liability has been deemed sufficient to sustain an action of assumpsit upon the ground that a party subjecting himself to the penalty or other liability imposed by statute has promised to pay it. . . . A statute liability wants all the elements of a contract, consideration, and mutuality, as well as the assent of the party.'

So the obligations incumbent upon officials to perform certain duties, and (although this is denied by Prof. Holland) the obligations attached by 'custom of the realm' to certain callings, as those of a common carrier to serve and carry safely for all who apply, and of an innkeeper to receive guests and safely keep their goods, are quasi-contractual.

So also the obligations and rights resulting from status—e. g. the obligation flowing from the relation of parent and child, which, as held in *Pretzinger* v. *Pretzinger*, 45 Ohio St. 452, requires a father to support his minor child even after a decree of divorce depriving him of its custody, and the right of the mother to recover from him reasonable compensation for necessaries furnished by her to the child after such decree, are quasi-contractual in their nature.

The most frequent instances, however, of quasi-contractual rights and duties are those which are founded on the maxim already quoted against unjust enrichment: such as the right against infants and lunatics to compensation for necessaries furnished them; the right against a tort feasor to hold him liable, apart from any question of tort, for the value of what he unjustly acquired (usually called the right to waive the tort and sue upon the implied promise); the right to recover the value of benefits conferred and deliberately retained under an actual contract, when by reason of failure to observe some formality (e. g. the Statute of Frauds), or

some default of complete performance not culpable, the plaintiff cannot sue on the contract itself; and the right to recover money paid, or the value of goods delivered under mistake of fact. It is these rights and duties occupying ground midway between contract and tort, the cases illustrating them and the principles exemplified in the cases, which we are to study together during the ensuing year. I venture to express the hope that the performance of this duty may prove as profitable and as pleasant for you as the course we covered together last year was for me.

GUSTAVUS H. WALD.

[Perhaps I may be allowed to put in a plea for Sir Matthew Hale's 'Analysis of the Civil Part of the Law' as having been a serious though not a very successful 'attempt to make a category of legal rights and duties.' At any rate it determined the arrangement of Blackstone's Commentaries.—F. P.]

INDICTMENTS AND THE RULE COMMITTEE.

SOME time ago I ventured to set forth in the pages of this REVIEW a few reasons for supposing that lawyers interested in the administration of the criminal law cannot look to Parliament for any improvement of that law by the ordinary process of legislation. How far the legislation in the course of the present Session has supported this view I do not wish to consider in detail, but I think it may be cited as proving, either that legislation dealing with the criminal law is likely to arouse such an amount of opposition as to render it even more unpopular in the future than it has been in the past, or that it is likely to have a mischievous effect. In any case, since the publication of the article referred to I have made what seems to me to be a discovery, and what has appeared in the same light to several eminent and experienced persons whom I have consulted in the matter. This is that the Rule Committee have power to regulate pleading, practice, and procedure in criminal cases tried at Assizes without any assistance from the Legislature, and I venture to think this power might be used with the most excellent effects. It would be easy to sketch out a complete reform of criminal procedure which might be effected in this way. I prefer however, by confining myself to more modest limits, to disarm all possible opposition, and at present therefore will only suggest an amendment of criminal pleading, in other words of indictments. Whatever may be the archaeological value of the law relating to indictments I do not think that any one can contend that it is rational or convenient. It ought to be a comparatively simple matter to describe the offence of which a prisoner is accused, and with the procedure followed in summary jurisdiction and the appropriate clauses of the Criminal Code Bill of 1880 before us, it is no very difficult matter to suggest rules which would put an end to all the existing phantasies which surround the subject in the case of indictable offences.

In the first place therefore I propose to show that the Rule Committee have power to make rules as to indictments, in the second to suggest rules which I think might profitably be made. In conclusion I will set out a few indictments as they are at present, and as they would be under the proposed rules, in considering which I will ask my readers to remember that the

proper purposes of an indictment are—(1) to inform the prisoner what the crime is of which he is charged, both in point of law and in point of fact; (2) to bind the prosecution down to proving a definite crime—definite, that is, from both these points of view; (3) to serve as a record of what offence a prisoner has been convicted or acquitted.

As to my first point I think it is obvious that the Crown Court at Assizes is a part of the High Court. I have never heard the fact doubted, but the proof is as follows. By sect. 16, sub-sect. (11) of the Judicature Act, 1873, there is transferred to the High Court 'the jurisdiction which at the commencement of this Act was vested in or capable of being exercised by . . . the Courts created by commissions of Assize, of Oyer and Terminer, and of Gaol Delivery, or any of such commissions.' By sect. 29 of the same Act 'Her Majesty by commission of Assize or by any other commission, either general or special, may assign to any judge or judges of the High Court or other persons usually named in commissions of Assize . . . the exercise of any . . . criminal jurisdiction capable of being exercised by the said High Court . . . and any commissioner or commissioners appointed in pursuance of this section shall, when engaged in the exercise of any jurisdiction assigned to him or them in pursuance of this Act, be deemed to constitute a Court of the High Court of Justice.' Thus it is plain that the old Courts of Assize and so forth have been abolished by having their powers 'transferred' from them and 'vested' in the High Court; and any person to whom a commission of Assize, &c., is issued is a Court of the High Court. Without going into more detail, this view is corroborated by sect. 26 of the same Act, and is at least not opposed to sect. 93. Further reference may be made to sects. 34 and 31. The former assigns certain functions to the various divisions of the High Court, and does not assign the trial of prisoners at Assizes to any of them, since the 'causes and matters . . . criminal' referred to in sub-sect. (2), detailing the matters assigned to the Queen's Bench Division, seem to be only those which are contained in the Crown Paper, Trials at Bar, Criminal Informations, &c. This, however, is no limitation of the powers of the Supreme Court or the High Court over criminal causes at the Assizes, since sect. 31 enacts only that 'there shall be in the said Court five divisions,' and does not say that it shall consist of five divisions, which seems to show that the Legislature bore in mind the fact that the Assize Courts were part of the High Court and purposely left them out of any division.

It is not necessary to consider in any detail the powers possessed by the Rule Committee. Their scope is determined by sect. 17

of the Judicature Act, 1875, and includes a power of 'regulating the pleading, practice, and procedure in the High Court of Justice.' This is extended by sect. 7 of the Appellate Jurisdiction Act, 1876, and sect. 22 of the Judicature (Officers) Act, 1879. The Rule Committee is constituted by sect. 19 of the Judicature Act, 1881, which it seems must apply to sect. 17 of the Act of 1875, though it does not do so expressly.

Other enactments might be quoted to corroborate my view of the powers of the Rule Committee, but sects. 16 of the Act of 1873 and 17 of the Act of 1875 really establish my whole point. I will therefore proceed to suggest fourteen rules, which would, I believe, make pleading in criminal cases as simple as it ought to be. All of them have been approved of in principle by a Committee consisting of Lord Blackburn, Justices Lush, Barry, and Stephen, and by Lord Cross and the law officers of 1880. I have not, however, tied myself closely to the provisions of the draft Code of 1880, because rules have, of course, no power to alter the substantive law, and in some respects I venture to think that the Committee would have taken rather a bolder line than they did had they had the experience which we have had of the administration of the Rules of 1883. The rules are as follows:—

1. These rules shall apply to indictments tried in the Queen's Bench Division of the High Court of Justice, and shall apply to informations as though they were indictments, but shall not apply to proceedings on the Crown side of the High Court of Justice.

2. Indictments shall begin in the form given in the schedule hereto or to the like effect.

Schedule.

County of Glamorgan.

Court of Oyer and Terminer, and Gaol Delivery.

The 25th day of May, 1898.

The Grand Jury charge (*specifying the offence*).

And they present (*stating the facts*).

Or,

The Grand Jury charge and present (*specifying the offence and facts*).

In case of several counts—

First Count. The Grand Jury charge and present, &c.

Second Count, { And the Grand Jury further charge and present, &c.

3. One indictment may contain any number of counts, provided that to a count charging murder no count charging any offence other than murder or being accessory to murder shall be joined;

and one indictment may contain counts for both felony and misdemeanour. Each count in an indictment may be treated as a separate indictment; and shall be tried separately, unless the Court otherwise orders. One count may charge any number of offences, and felonies and misdemeanours may both be charged in one count; but one count shall not in general present more than one transaction. Provided that nothing herein contained shall be taken to diminish the effect of sects. 5 and 71 of the Larceny Act, 1861, but that it shall be lawful to include the distinct acts of stealing, not exceeding three, referred to in sect. 5, and the distinct acts of embezzlement, not exceeding three, referred to in sect. 71, in one count.

Where the Court considers that an accused person may be embarrassed in his defence by more than one offence being charged as arising out of one transaction, or by more than one transaction being presented in one count, the Court may amend the count by dividing it as they see fit, or may put the prosecutor to his election as to which one or more of the offences charged, or of the transactions presented, he will proceed on: and the Court shall have absolute discretion as to the offences or transactions between which the prosecutor is to make his election.

Note.—This rule is taken to a great extent from sects. 430, 431, and 441 of the Code. The idea is that one indictment will contain all the charges to which a prisoner is liable; a count will take the place, roughly speaking, of an indictment of to-day; but each count will contain only one set of facts. Each count will consequently be tried separately. I alter the rule as to election where more than one offence is charged; the present rule is obviously absurd.

4. Every count of an indictment shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some indictable offence or offences therein specified.

Such statement may be made in popular language without any technical averments or any allegations of matter not essential to be proved. The crime may be described by the term by which it is commonly known, or in the words of the enactment describing the crime or declaring the matter charged to be a crime, or in any words sufficient to give the accused notice of the crime with which he is charged.

Every count shall contain so much detail of the circumstances of the alleged crime as is sufficient to give the accused reasonable information as to the act or omission to be proved against him, and to identify the transaction referred to. A count may refer to any section, or part of any section, of any statute creating the offence

charged therein, and in estimating the sufficiency of such count the Court shall have regard to such reference.

Note.—This is a most important rule; it is taken nearly verbatim from sect. 430 of the Code.

5. The Court may, before the verdict is given, make any amendment in an indictment or in an amended indictment, and may, and if the amendment is calculated to embarrass the prisoner in his defence, shall, cause the trial to be adjourned to a future day of the current sittings, or to a future sitting of the same Court, or to the next sitting of any other tribunal competent to try the case. In considering whether an indictment ought to be amended, the Court may have regard to the depositions.

The Court may make any amendments in any pleading other than an indictment, or in any particulars that they may make in case of an indictment.

Note.—This is the most important proposal of all. It corresponds to sect. 436 of the Code. In theory it enables a judge to try a man for murder when he has been committed for larceny. I have tried to limit the judges' power to amendments which would cause the prisoner to be tried only for the same kind of offence as that of which he is accused, but without any satisfactory result; and I suggest it is better to leave the matter in the simple way I have put it.

My rule resembles the provision contained in the Code as it was originally drafted, rather than as it was finally settled.

6. No count for publishing a blasphemous, obscene, or defamatory libel, or for selling or exhibiting an obscene book, pamphlet, newspaper, or other printed or written matter, shall be deemed insufficient on the ground that it does not set out the words thereof: provided that the Court may order that a particular shall be furnished by the prosecutor stating what passages in such book, pamphlet, newspaper, printing, or writing are relied on in support of the charge.

A count for libel may charge that the matter published was written in a sense which would make the publishing criminal, specifying that sense without any prefatory averment showing how the matter was written in that sense. And on the trial it shall be sufficient to prove that the matter published was criminal either with or without such innuendo (? averment).

Note.—This comes verbatim out of the Code: see sect. 433. I suppose that where the libel is contained in a few words it would always be set out; but where it consists of lengthy passages in

a book or pamphlet it might properly be described by reference to lines and pages. The rule would at all events do away with the absurdity of having a whole pamphlet engrossed, as was done in the case of *R.* v. *Butterfield* in 1890, giving rise to a justification 17 feet long.

The effect of par. 2 I take to be that all the facts which make a statement libellous are to be expressed in the innuendo. I am not sure that this would always be the right way of doing it; e.g. *A* wrote of *B*, 'he is a blackleg and has been expelled from his union,' meaning thereby that *B* was a member of the Seaman's and Fireman's Union, that a strike took place, that *A* did not come out with the other men, &c. In such a case it ought to be made plain in the indictment that the words may be libellous, and if you are going to tell the story the words ought to come at the end of it. On the other hand, one does not want the story told in the averments to be repeated in the innuendo.

7. A rule to be drafted on the following lines:—

In an indictment for perjury it shall be sufficient to specify the Court before which it was committed and its sitting, without alleging that it was properly constituted or competent to administer an oath. It shall not be necessary to state that the statement was material; a general statement of its falsity shall be sufficient.

8. The same as to false pretences as far as their falsity is concerned.

Note.—As to these two rules see sect. 434 of the Code. The rules are much less sweeping than the Code, which among other things makes it unnecessary to give the words used in perjury, or to 'set out in detail' the false pretences, &c. This surprises me, and I prefer to leave these rules in an unfinished state.

9. The prosecutor may at any time before the trial give to the accused and to the Court particulars of the offence charged in the indictment, and the Court may at any time order the prosecutor to give such particulars upon such terms as to them shall seem just.

In considering whether particulars are required or not the Court may have regard to the depositions.

The particulars herein referred to shall be in the form given in the schedule hereto or to the like effect.

Note.—See sect. 435 of the Code, by which particulars were confined to charges of perjury and fraud.

10. Any plea to an indictment which is made in writing shall begin in the form in the schedule hereto or to the like effect. It

shall be subject to the rules hereby provided as to indictments, and shall be held sufficient if it sets forth in a summary form the points of law and the material facts on which the party pleading intends to rely. A prosecutor may in his replication to a plea to an indictment join issue upon the plea, and such joinder of issue shall operate as a denial of every material allegation of facts in the pleading upon which issue is joined; but it may except any facts which the party may be willing to admit, and shall then operate as a denial of the facts not so admitted.

Note.—The only plea to an indictment which must be made in writing is justification of a libel; autrefois acquit and autrefois convict need not. Cf. sect. 450 of the Code.

11. It shall not be necessary to state in any indictment or other document connected with the trial of a prisoner whether the crime which he is alleged to have committed or which he has been convicted of committing is a felony or misdemeanour. The prisoner may plead not guilty after demurrer in cases both of felony and misdemeanour.

The prisoner may plead over a plea of autrefois convict or autrefois acquit in misdemeanour as in felony.

Note.—There remain unaffected the differences between misdemeanours and felony in relation to—(*a*) arrest, (*b*) bail, (*c*) swearing the jury, (*d*) arraigning and giving in charge, (*e*) challenges, (*f*) calling on the prisoner, (*g*) previous convictions, (*h*) disqualification on conviction, (*i*) the effect of previous conviction.

I suggest that the Rule Committee could abolish distinctions (*c*), (*d*), (*e*) and (*f*), but the matter is not quite simple.

12. Every count shall be deemed divisible; and if the commission of the crime charged, as described in the enactment creating the crime or as charged in the count, includes the commission of any other crime, the person accused may be convicted of any crime so included which is proved, although the whole crime charged is not proved; or he may be convicted of an attempt to commit any crime so included, provided that on a count for murder the jury shall not find the prisoner guilty of any other offence than murder or manslaughter or an attempt to commit murder.

Note.—I suggest that this is a matter of procedure or pleading. Cf. sect. 440 of the Code.

13. No objection shall be taken to an indictment except by a motion to quash, which may be made at any time previous to judgment; by motion in arrest of judgment, which may be made after conviction and before judgment; or by a writ of error.

Demurrers are abolished. If a copy of the indictment is served on the prisoner within days of the trial, no objection may be taken to it without leave of the Court, except by a written notice served on the prosecution within days of the trial stating what objections will be taken; in which case no objection may be made which is not stated in the notice except by leave of the Court.

Note.—I have supposed demurrers not to be abolished in rule 11. The second part of this rule is designed to meet cases where the accused person is defended before the actual trial takes place.

14. Indictments may be on paper: numbers may be indicated by figures.

I add a few forms of common indictments drafted as they would be under the rules, and as they are now.

LARCENY.

The Grand Jury charge *A* with larceny against the Common Law and the Larceny Act, 1861, sect. 4.

And they present that on the 10th of April, 1898, he stole a watch the property of *B*.

Or,

The Grand Jury charge and present that on the 10th of April, 1898, *A* committed larceny against the Common Law and the Larceny Act, 1861, sect. 4, by stealing a watch the property of *B*.

(*Previous Conviction.*)

And the Grand Jury further present that *A* was convicted of felony on the 14th of October, 1897, at the Quarter Sessions for the County of Monmouth.

Present Form (Archbold).

The County of Glamorgan to wit. } The jurors for Our Lady the Queen upon their oath present that *A*, on the tenth day of April, in the year of our Lord one thousand eight hundred and ninety-eight, one watch of the goods and chattels of *B* feloniously did steal, take, and carry away, against the peace of Our Lady the Queen, her crown and dignity.

And the jurors aforesaid upon their oath aforesaid do further present that heretofore and before the commission of the felony hereinbefore charged, to wit, at the Court of General Quarter Sessions for the County of Monmouth holden on the fourteenth

day of October, in the year of our Lord one thousand eight hundred and ninety-seven, on the same day as last aforesaid the said *A* was convicted of felony, which said conviction is still in full force, strength, and effect, and not in the least reversed, annulled, or made void.

EMBEZZLEMENT.

The Grand Jury charge *A* with embezzlement under the Common Law and the Larceny Act, 1861, sect. 68.

They present that on the 10th of April, 1897, he was clerk to *B*, and as such received £5 from *C*, which he embezzled.

Or,

The Grand Jury charge and present that on the 10th of April, 1897, *A* was clerk to *B*, and as such received £5 from *C*, which he embezzled contrary to the Common Law and the Larceny Act, 1861, sect. 68.

Present Form (Archbold).

County of Glamorgan to wit. } The jurors for Our Lady the Queen upon their oath present that *A*, on the tenth day of April, in the year of our Lord one thousand eight hundred and ninety-seven, being then employed as clerk to *B*, did then, and whilst he was so employed as aforesaid, receive and take into his possession certain money to a large amount, to wit to the amount of five pounds, for and in the name and on the account of the said *B* his master, and the said money then fraudulently and feloniously did embezzle; and so the jurors aforesaid upon their oath aforesaid do say that the said *A* then, in manner and form aforesaid, the said money the property of the said *B* his said master feloniously did steal, take, and carry away, against the form of the Statute in such case made and provided, and against the peace of Our Lady the Queen, her crown and dignity.

Note.—The reason for adding the last clause in this form seems to be that by sect. 72 of the Larceny Act a jury may convict of larceny on an indictment for embezzlement.

FALSE PRETENCES.

The Grand Jury charge *A* with obtaining money by false pretences with intent to defraud under the Larceny Act, 1861, sect. 88.

They present that on the 10th of April, 1897, *A* obtained £5 from *B* by pretending that a cheque drawn by himself on the

London and Westminster Bank was a good order for the payment of that sum, and the bank had agreed to pay the amount thereof.

Present Form (Archbold).

County of Lancaster to wit. } The jurors for Our Lady the Queen upon their oath present that *A*, on the tenth day of April in the year of our Lord one thousand eight hundred and ninety-seven, unlawfully, knowingly, and designedly did falsely pretend to *B* that a cheque drawn on the London and Westminster Bank (Limited), which he the said *A* then gave to the said *B*, was a good order for the payment of the sum of five pounds to the said *B*, and that it had, before then, been agreed between him the said *A*, and one *C*, the manager of the said bank, that the amount of the said cheque should be paid on the presentation thereof at the said bank, by means of which said false pretences the said *A* did then unlawfully obtain from the said *B* certain money, to wit five pounds, with intent to defraud; whereas in truth and in fact the said cheque was not a good order for the payment of five pounds as aforesaid, and it had not before then been agreed between, &c. (*as above*), as he the said *A* well knew at the time when he did so falsely pretend as aforesaid; against the form of the Statute in such case made and provided, and against the peace of Our Lady the Queen, her crown and dignity.

Add two counts alleging the false pretences to be (1) *that the cheque was a good order, &c.*; (2) *that the agreement had been made.*

COMMON ASSAULT.

The Grand Jury charge and present that *A*, on the 10th of April, 1897, committed a common assault on *B*, contrary to 24 and 25 Vict. c. 100, s. 47.

Present Form (Archbold).

County of Lancaster to wit. } The jurors for Our Lady the Queen upon their oath present that *A*, on the tenth day of April, in the year of our Lord one thousand eight hundred and ninety-seven, in and upon one *B* did make an assault, and him the said *B* did then beat, wound, and ill-treat, and other wrongs to the said *B* then did, to the great damage of the said *B*, against the form of the Statute in such case made and provided, and against the peace of Our Lady the Queen, her crown and dignity.

FRAUDULENT BANKRUPTCY.

Two Counts.

First Count.

The Grand Jury charge *A* with being a bankrupt and failing to discover all his property to the Official Receiver; and with making a material omission in a statement relating to his affairs; and with not delivering up to the Official Receiver, or as he directed, part of his property which was in his custody or under his control, and which he was by law required to deliver up; and with not delivering up to the Official Receiver, or as he directed, all documents, papers, and writings in his custody and under his control relating to his property and affairs; contrary to the Debtors Act, 1869, sect. 11, sub-sects. (1), (6), (2), and (3).

And they present as follows:—*A* was adjudged a bankrupt in the Cardiff County Count on the 10th of April, 1896, and *B* was then appointed as Official Receiver. *A* on the 30th of June, 1896, handed to *B* what purported to be a complete account of all his property, but he omitted therefrom an I.O.U. for £45 drawn in his favour by *C* and dated the 15th of April, 1897. And he did not deliver up the said I.O.U. to *B* or as he directed.

Second Count.

And the Grand Jury further charge *A* with being a bankrupt and failing to deliver up to the Official Receiver, or as he directed, part of his property which was in his custody and under his control, and which he was by law required to deliver up, contrary to the Debtors Act, 1861, sect. 11, sub-sect. (2).

And they present that *A* was adjudged a bankrupt and *B* was appointed his receiver as aforesaid, and that *A* did not deliver up to *B*, or as he directed, a certain stack of hay and farming stock on a farm at Llanishen.

The indictment in use at present would contain five counts, each of which would be about the same length as each of the above, because by sect. 19 *of the Debtors Act it is enough to 'set out the substance of the offence charged in the words of this Act.'*

PERJURY.

The Grand Jury charge *T. S.* with wilful and corrupt perjury against the Common Law and 5 Eliz. c. 93, and 2 Geo. II, c. 25.

And they present that on the 10th of April, 1897, *S. K.* was tried at Warrington Petty Sessions for selling beer during closing hours on

Sunday. *T. S.* was sworn as a witness and said, 'I was never in the house at all that day, and never saw the policeman before in my life. I never was in Burtonwood at all that day. I had not been in it for a fortnight before that day.' These statements were all false to his knowledge when he made them.

The corresponding form in Saunders contains 1155 words. This one contains 168.

These rules and forms are no doubt capable of a good deal of amendment, as the work of one man on such a subject always must be; but I suggest that they indicate the kind of improvement which the Rule Committee could effect in our present system of criminal pleading, with I believe the universal approbation of all persons concerned.

H. L. Stephen.

FOLLOWING PROPERTY IN THE HANDS OF AN AGENT.

TO what extent a principal is entitled to follow and recover money or securities which he has placed in the hands of a stockbroker for the purpose of investment, of safe custody, or of sale, is a question which is of importance owing to the vast and continually increasing amount of the transactions daily conducted upon the Stock Exchange. A stockbroker is neither more nor less than the agent of his principal, and the general rule of law that an agent is in the position of a trustee for his principal of property belonging to the principal which is for the time being in the agent's custody, is now beyond dispute [1]; but the question appears to be still open to argument as to whether this fiduciary relationship exists for all purposes or is confined to particular species of property.

In cases of express trust the law is clear that, in the event of a breach of trust being committed by the trustee, a *cestui que trust* is entitled to follow the trust property—into whatever form it may have been converted, and whether the trustee's estate is or is not being administered by the Court of Bankruptcy [2]—into the hands of any one who either is not himself a holder for value without notice of the trust, or has not derived his title from a person who was in that position; provided that the property can be identified, and that the claim is not barred by lapse of time. And it is difficult to understand why a distinction should be made between express trusts and trusts created by implication of law.

It is perhaps permissible to doubt whether it was altogether a wise policy which, in the first instance, led to the introduction of the 'intricacies and doctrines connected with trusts' into ordinary commercial relations. One would have thought that the owner of property, who voluntarily placed his property in the hands of another, might have been left to such remedies as the ordinary relation of debtor and creditor would have afforded, in case the credit or integrity of his agent proved to be less satisfactory than he supposed. But since these doctrines have been introduced, it will surely be more convenient to adopt the broad principle that whenever a fiduciary relationship is established

[1] *Whitecomb* v. *Jacob*, 1 Salk. 160; *Taylor* v. *Plumer*, 3 M. & S. 562, 16 R. R. 361; *Ex parte Cooke, In re Strachan*, 4 Ch. D. 123; *Knatchbull* v. *Hallett*, 13 Ch. D. 696; *Harris* v. *Truman*, 7 Q. B. D. 340.

[2] *Ex parte Hardcastle, re Mawson*, 44 L. T. 523.

between an owner of property and a person to whom he entrusts it for a specified purpose, the relationship shall continue to exist as to the property no matter what may be the changes in its form, than that the relations of the parties shall depend upon and vary with variations in the property's character.

In his Principles of Bankruptcy [1] Lord Justice Vaughan Williams, after stating that 'there is a third class of trusts, where the bankrupt has not the general but only a special property, e.g. where the property is vested in the bankrupt as an agent, such as a factor, &c.'—a category which undoubtedly includes brokers—continues: 'It has been said (*Taylor* v. *Plumer*, 3 M. & S. 575) that the reason why money, the proceeds of goods deposited with a factor, passes on the bankruptcy of the factor to the trustee in bankruptcy, is that money intermixed with other moneys cannot be distinguished: but it would seem from the cases of *Frith* v. *Cartland*, 34 L. J. Ch. 301, and *Pennell* v. *Deffell*, 23 L. J. Ch. 115, that this is not so, and that the true reason why the Court of Bankruptcy will not appropriate to the principal money so received and intermixed by the factor is that, according to the ordinary course of business between merchants and their factors, the former voluntarily become the creditors of their factors in respect of the moneys so received, whereby the moneys, although the proceeds of goods received on trust, lose their trust character.'

As will be seen presently, what *Pennell* v. *Deffell* and *Frith* v. *Cartland* decided was, that a trust fund may be followed although it consists of money, provided that the money can with reasonable certainty be identified as the trust property, or as the proceeds of the trust property; in other words, that by 'ear-marking,' in the case of money, a reasonably certain identification is to be understood, and not that, if anything is to be taken out of a mixed fund, it must be the identical coins which were put in. *Frith* v. *Cartland*, indeed, appears to be in distinct opposition to the contention that money, the proceeds of property entrusted to an agent of this class, loses its trust character, and, after a review of the earlier cases, it will be submitted that not one of them supports such a proposition.

The earliest reported authority on the point appears to be the case of *Whitecomb* v. *Jacob* [2] decided in the year 1711. In that case it was held that 'if one employs a factor and entrusts him with the disposal of merchandise, and the factor receives the money and dies indebted in debts of a higher nature, and it appears by evidence that this money was vested in other goods, and remains unpaid, those goods shall be taken as part of the merchant's

[1] Sixth Edition, p. 172.

[2] 1 Salk. 160.

estate, and not of the factor's; but if the factor have the money, it shall be looked upon as the factor's estate, and must first answer the debts of a superior creditor, &c., for in regard that money has no ear-mark, equity cannot follow that in behalf of him that employed the factor.' So that, in this case, there was a trust as to the property originally deposited with the factor, and a trust as to the property bought with the proceeds of the original property, and both could be followed; but the money itself could not be followed, not, according to the Court, because it had lost its trust character, but because it was considered at that period that money could not be ear-marked.

In 1716, in the case of *Copeland* v. *Gallant*[1], Lord Hardwicke held that if a bankrupt was in possession of goods of which he was empowered to dispose on behalf of another, such property was not liable to the bankrupt's debts either in law or in equity.

In the next case, *Godfrey* v. *Furzo*[2] in 1733, the question was as to goods entrusted to a factor in London by a merchant beyond sea, and Lord Chancellor King said: 'The factor in this case being only a servant or agent for the merchant beyond sea, can have no property in such goods; neither will they be affected by his bankruptcy.' In a note to the case it is recorded that in a case of *Ex parte Chion*, heard in Trinity term 1721, Lord Parker had held that where a factor in London, having money of J. S. who resided in Holland, bought South Sea stock as factor of J. S., and took the stock in his own name, but entered it in his account-book as bought for J. S., the stock was not liable to the factor's debts in his bankruptcy.

In 1742 it was held in *Scott* v. *Surman*[3] that if goods were consigned to a factor for sale, and he sold and received the money before his bankruptcy, and did not purchase with it any specific thing capable of being distinguished from the rest of his property, the principal could not recover the whole of the money from the bankrupt's assignees, but must prove in the bankruptcy as an ordinary creditor. But it was laid down that if the goods remained in specie in the factor's hands at the time of the bankruptcy the merchant was entitled to recover them from the assignees, and that the same was the case with money if it had not actually been paid to the factor by the purchaser, but was subsequently paid to the assignees. And Chief Justice Willes, in delivering the considered judgment of the Court, stated that the reason why money could not usually be followed was that it had no ear-mark. From this case it is evident that the Chief Justice considered that the trust attached as much to the money as to the property from which the money was derived; for otherwise the money could not have been

[1] 1 P. Wms. 314. [2] 3 P. Wms. 185. [3] Willes, 400.

followed when paid to the bankrupt's assignees subsequently to the bankruptcy.

In commenting upon this case in the later case of *Ryall* v. *Rolle* [1] in 1749, Burnet J. said: 'Suppose goods are consigned to a factor who sells them and breaks, the merchant for the money must come in as a creditor under the commission; but if the money is laid out in other goods, those goods will not be subject to the bankruptcy. Suppose instead of selling the goods for ready money, he sells for money payable at a future day, and breaks before the day, if the assignees receive the money it will be for the use of the merchant. Or suppose that the factor has taken notes for the goods, if his assignees receive the money upon these notes it will be to the merchant's use.'

In *Ex parte Sayers* [2] in 1800 it was held that bills which had come into the custody of the assignees of a bankrupt factor were not liable to the factor's debts, but that his principal had a lien upon them.

In *Taylor* v. *Plumer* [3], decided in 1815, a principal handed to his broker a draft for money which he directed him to invest in Exchequer bills. The broker misapplied the money by purchasing American stocks and bullion, and was arrested with the securities upon him as he was starting for America. In an action by the broker's assignee in bankruptcy for delivery of the securities to him, Lord Ellenborough held that the principal was entitled to keep them as they had been bought with his money. His lordship said [4]: 'The plaintiff in this case is not entitled to recover if the defendant has succeeded in maintaining these propositions of law, viz. that the property of a principal entrusted by him to his factor for any special purpose belongs to the principal, notwithstanding any change which that property may have undergone in point of form, so long as such property is capable of being identified, and distinguished from all other property.' And again [5]: 'And, indeed, upon a view of the authorities, and consideration of the arguments, it would seem that if the property in its original state and form was covered with a trust in favour of the principal, no change of that state and form can divest it of such trust, or give the factor or those who represent him in right, any other more valid claim in respect to it, than they respectively had before such change.' Later on he says [6]: 'It makes no difference in reason or law into what other form, different from the original, the change may have been made, whether it be into that of promissory notes

[1] 1 Atk. 172.
[2] 3 M. & S. at p. 562, 16 R. R. 361.
[3] 3 M. & S. at p. 574, 16 R. R. 366.
[4] 5 Ves. 169, 5 R. R. 17.
[5] 3 M. & S. at p. 573, 16 R. R. 366.
[6] 3 M. & S. at p. 575, 16 R. R. 367.

for the security of the money which was produced by the sale of the goods of the principal, as in *Scott* v. *Surman*, or into other merchandise, as in *Whitecomb* v. *Jacob*; for the product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description. The difficulty which arises in such a case is a difficulty of fact and not of law, and the dictum that money has no ear-mark must be understood in the same way, i.e. as predicated only of an undivided and indistinguishable mass of current money. But moneys in a bag, or otherwise kept apart from other money, guineas, or other coin marked (if the fact were so) for the purpose of being distinguished, are so far ear-marked as to fall within the rule on this subject, which applies to every other description of personal property whilst it remains (as the property in question did) in the hands of the factor or his general legal representatives.'

The above cases, it is submitted, establish three propositions, two of which are still good law, while the third is not. All the cases cited show (1) that property deposited with a factor by a principal is trust property and may be followed while in his hands, or in the hands of any one who claims as his representative; *Whitecomb* v. *Jacob*, *Scott* v. *Surman*, *Ryall* v. *Rolle*, *Ex parte Sayers*, and *Taylor* v. *Plumer* prove (2) that if the factor has sold the original property and has invested the money in other goods, the trust attaches to those goods and the principal is entitled to claim them; and *Whitecomb* v. *Jacob*, *Scott* v. *Surman*, *Ryall* v. *Rolle*, and *Taylor* v. *Plumer* are authorities for the proposition that money cannot be followed because it cannot be identified. The two former propositions have never been disputed; while as to the third, it is to be observed that it was never laid down absolutely that money could not be followed[1], but merely that it could not be followed if it could not be identified. As has been shown, Lord Ellenborough in *Taylor* v. *Plumer* held that the principal could recover money if it had been kept separate; in 1762, in the case of *Howard* v. *Jemmet*[2], Lord Mansfield said: 'If an executor become bankrupt the commissioners cannot seize the specific effects of his testator; not even in money which *specifically can be distinguished and ascertained* to belong to such testator and not to the bankrupt himself;' and, as we have seen, in *Scott* v. *Surman* the Court held that if the

[1] Unless *Whitecomb* v. *Jacob* is to be taken as an authority to that effect, but the judgment in that case must be considered as qualified on this point by the later cases of *Howard* v. *Jemmet* and *Taylor* v. *Plumer*.

[2] 3 Burr. 1369.

money had not already been paid to the bankrupt at the date of his bankruptcy, the principal was entitled to recover it from the bankrupt's assignees when subsequently paid to them. These cases, it is submitted, clearly show that it was not a lapse of trust upon conversion of the property into money, but the difficulty of tracing the money when once it had come into the bankrupt's hands, which, in the opinion of the judges of that period, prevented the principal from recovering in the latter case. And there is no reason to doubt—although there does not appear to be any authority on the point—that the right of recovery would have been lost under these circumstances in cases of express as well as of implied trusts.

The principle, no doubt, upon which the former policy of the Courts of Chancery was based was that the currency has no specific and distinguishing characteristic such as a piece of personal property would usually possess, and therefore a *cestui que trust* could never say of a particular coin, 'That is my sovereign.' But in modern times the Courts have adopted a wider view of the question of identification, and, in the cases of *Pennell* v. *Deffell*, *Frith* v. *Cartland*, and *Knatchbull* v. *Hallett*, have recognized the possibility of ear-marking, in the sense of identifying, money. Accordingly, Lord Justice Williams is driven to find some other ground for the proposition that money in the hands of a factor is not recoverable by his principal, and he offers one which, it is submitted with respect, is hardly consistent with reason, and for which apparently the only authority—if an authority it be—is a dictum of Lord Justice Thesiger in *Knatchbull* v. *Hallett*. For, assuming *Taylor* v. *Plumer* and similar cases to have been correctly decided, if the trust lapsed upon conversion into money this curious result would follow—that property lodged with the factor would be trust property; that the money into which it was converted would be freed from the trust; but that if the factor were to expend that money in the purchase of other property, the trust would again revive and attach to such property. But modern decisions do not support this proposition.

In *Pennell* v. *Deffell*[1] an official assignee of the Court of Bankruptcy had, contrary to the rules of his office, paid moneys received by him in his official capacity, with moneys of his own, indiscriminately into his banking accounts. The plaintiff, his successor in office, claimed all the moneys standing to the assignee's credit in these accounts as trust moneys, but his claim was opposed by the representatives of the general creditors, who maintained that the plaintiff was only entitled to prove *pari passu* with the other

[1] (1854), 23 L. J. Ch. 115.

creditors. The Master found that the balances on both accounts were applicable, in the first instance, to the payment of the balances paid in by the assignee on account of insolvent estates, and remaining due at his death. Sir John Romilly M.R., however, overruled the Master's finding on the ground that 'the trust moneys being mixed up with his private moneys in his general account were indistinguishable according to the principle of *Massey* v. *Banner*, which case governs the present; and that as the trust moneys were not ear-marked, Mr. Green's (the official assignee) account is not applicable to the payment of the balances paid in on account of the bankrupt's estates, and remaining due at his death, in priority over his general creditors.' Here again, it will be observed, it was a want of ear-mark and not a failure of trust which was supposed to render the moneys irrecoverable. But Lords Justices Knight Bruce and Turner overruled Sir John Romilly's decision, holding that the moneys, though not ear-marked in the sense that the original coins were individually recognizable, were sufficiently identifiable for practical purposes, and were therefore recoverable by the plaintiff.

Frith v. *Cartland*[1] was a somewhat similar case. The question there was whether the plaintiffs, Frith and Co., were entitled, in the character of *cestuis que trustent*, to recover from the assignees in bankruptcy of one Edwards the proceeds of certain bills which they had lodged with him, after such proceeds had been mixed with moneys belonging to Edwards personally. Frith and Co. had been in the habit of employing Edwards as their agent for the sale of goods abroad, and just before his bankruptcy had accepted bills for £2,500 which he had drawn upon them, a portion of the proceeds of which were in his possession at the time of his arrest. Vice-Chancellor Wood held that the principle of *Pennell* v. *Deffell* applied, and that the plaintiffs were entitled to such sum as was attributable to the proceeds of the bills.

In *Ex parte Cooke, in re Strahan*[2] a trustee employed a broker, who had notice of the trust, to sell out consols and invest the proceeds in railway stock. The broker sold the consols for cash, bought railway stock to the same amount for settling day, and received the price of the consols in a cheque, which he paid into his account at his bankers. He stopped payment and went into liquidation before settling day, and the trustee claimed so much of the broker's balance at his bankers as was attributable to the price of the consols. The Registrar disallowed the claim, holding that the relation between broker and principal was similar to that between banker and customer, and that the trustee was merely a general creditor.

[1] (1865), 34 L. J. Ch. 301. [2] (1876), 4 Ch. D. 123.

The Court of Appeal, however, overruled this decision, holding that as the consols were known to the broker to be trust-funds the trustee was entitled to follow the money. Lords Justices James and Bramwell further held that, apart from notice of the trust, the money might have been followed, since the relation of broker and client is not that of banker and customer, but of agent and principal. The case, therefore, shows that, in the opinion of those two very able judges not only is a broker a trustee of the property originally entrusted to him by his client, but also, in some cases at any rate, of the money derived from that property.

In *Ex parte Dale*[1] a bank had been employed to collect money and remit it to their employers. The bank received the money in cash, placed it with other cash belonging to the bank, and informed their employers that the money had been remitted. But before the money was actually remitted the bank went into liquidation. Mr. Justice Fry, who tried the case, said: 'It appears to me clear that the bank, in the collection of these average orders, was a special agent of the claimants, and stood in what has been called a fiduciary relation towards them. It appears further clear that if the money, which they had so received under their special agency, had been kept separate from all the other money in the bank, or if it had been invested rightfully or wrongfully in some property into which the specific money could be traced without any mixture having taken place, then in either of those two cases Messrs. Dale and Co. could follow the money, or the property into which the money had gone.'

On the authority, however, of the early cases which have already been discussed, the learned judge felt himself bound to decide against Messrs. Dale's claim to follow the money. At the same time he did so with regret. 'Before parting with the case,' he said, 'I am bound to say that upon principle I feel the greatest difficulty, because I think that the principles of equity are very much opposed to that line of decision. Let me put the point in this way: If it be a case of trustee and *cestui que trust*, and the trustee mingles with his own money the money which he holds in trust, can he as against the *cestui que trust* say that the money has so lost its character of trust money that it cannot be followed? Upon that point the observations of Lord Justice Knight Bruce in the case of *Pennell* v. *Deffell* appear most forcible.' After quoting from the Lord Justice's judgment in the case mentioned, Mr. Justice Fry continues: 'That seems a decision that as between *cestui que trust* and trustee the mixing of the fund is immaterial so long as there is a fund on which the *cestui que trust* can lay his hands. Does it make any difference that instead

[1] (1879), 11 Ch. D. 772.

of trustee and *cestui que trust*, it is a case of fiduciary relationship? What is a fiduciary relationship? It is one in respect of which if a wrong arise, the same remedy exists against the wrong-doer on behalf of the principal as would exist against a trustee on behalf of the *cestui que trust*. If that be a just description of the relationship, it would follow that wherever fiduciary relationship exists, and money coming from the trust lies in the hands of persons standing in that relationship, it can be followed and separated from any money of their own. That seems to me to be the logical result of *Pennell* v. *Deffell*: but that result is opposed to the long line of authorities to which I have referred, and from which I do not feel myself justified by any reasoning of my own in departing.' It will therefore be observed that, in the first place, Mr. Justice Fry saw no difference in principle in the position of an express and an implied trustee; and, in the second, that, against his better judgment, he supported the principle that money could not be followed in these cases, not on the ground taken by Lord Justice Vaughan Williams that it loses its trust character, but on the ground taken in *Taylor* v. *Plumer* and the earlier cases that it could not be ear-marked—a proposition which the present Lord Justice agrees to be no longer capable of support.

We come now to the well-known case of *In re Hallett's Estate: Knatchbull* v. *Hallett*[1], in which the law as to persons in a fiduciary relation was most elaborately treated by Sir George Jessel M.R. It is clear from his judgment that that very able judge considered that the trust attached in every case, whatever the form into which the property had been converted, and whether the trust were express or implied. 'Has it ever been suggested,' he said[2], 'until very recently, that there is any distinction between an express trustee, or an agent, or a bailee, or a collector of rents, or anybody else in a fiduciary position? I have never heard, until quite recently, such a distinction suggested. It cannot, as far as I am aware (and since this Court sat last to hear this case, I have taken the trouble to look for authority), be found in any reported case even suggested, except in the recent decision of Mr. Justice Fry, to which I shall draw attention presently. It can have no foundation in principle, because the beneficial ownership is the same wherever the legal ownership may be. If you have goods bargained and sold to a man upon trust to sell and hand over the net proceeds to another, that other is the beneficial owner; but if instead of being bargained and sold so as to vest the legal ownership in the trustee, they are deposited with him to sell as agent, so that the legal ownership remains in the beneficial owner, can it be supposed, in

[1] (1880), 13 Ch. D. 696. [2] 13 Ch. D. 709-710.

a Court of Equity, that the rights of the beneficial owner are different, he being entire beneficial owner in both cases? I say on principle it is impossible to imagine there can be any difference. In practice we know there is no difference, because the moment you get into a Court of Equity, where a principal can sue an agent as well as a *cestui que trust* can sue a trustee, no such distinction was ever suggested, as far as I am aware. Therefore, the moment you establish the fiduciary relation, the modern rules of equity, as regards following trust money, apply . . . Now that being the established doctrine of equity on this point, I will take the case of the pure bailee. If the bailee sells the goods bailed, the bailor can in equity follow the proceeds wherever they can be distinguished, either being actually kept separate, or being mixed up with other moneys.'

His lordship then proceeded to state the principles upon which money may be followed; and, after reviewing the authorities already discussed, he said [1], 'I think after those authorities it must now be considered settled that there is no distinction, and never was a distinction, between a person occupying one fiduciary position or another fiduciary position as to the right of the beneficial owner to follow the trust fund, and that those cases which have been cited at law, so far from establishing a distinction, establish the contrary; and that the mere error of supposing that equity could not follow or distinguish money in the cases supposed, if error it was (I am not sure that the doctrine of equity had got so far at the first start, but it was certainly an error at a later period), is attributable really to the fact that the judges who followed the earlier cases were not aware of what I may call the gradual refinement of the doctrine of equity.' He then expressed approval of *Pennell* v. *Deffell* and *Frith* v. *Cartland*, and dissented from Mr. Justice Fry's decision in *Ex parte Dale*.

It may be that Sir George Jessel's opinions on some of these points were not strictly relevant to the question at issue; but we have, at any rate, the opinion of one of the greatest masters of equity law who have lived, that if once a trust of property is created, the trust continues until the property is irrevocably dispersed. And in the subsequent cases in which *Knatchbull* v. *Hallett* has been noticed, that position has never been questioned, although, as will presently be seen, Lord Justice Bramwell in one case objected to introducing trust doctrines too largely into purely mercantile relations, and Sir George Jessel himself found it necessary upon a subsequent occasion to limit the classes of agents who came within the circle of fiduciary relationships.

[1] 13 Ch. D. 720.

In the same case Lord Justice Baggallay said: 'Assuming there to have been nothing more in the case[1] than appears in the printed report, I feel bound to say that I cannot concur in the view expressed by Mr. Justice Fry as to the binding character of the authorities to which he referred.'

Again, Lord Justice Thesiger said: 'It has been established for a very long period, in cases in law as well as in cases in equity, that the principles relating to the following of trust property are equally applicable to the case of a trustee, using the term in the narrow and technical sense which is applied to it in the Court below, and to the case of factors, bailees, or other agents. The principle of law may be stated, as it appears to me, in the form of a very simple, although at the same time very wide and general proposition. I would state that proposition in these terms, namely, that wherever a specific chattel is entrusted by one man to another, either for the purpose of safe custody, or for the purpose of being disposed of for the benefit of the person entrusting the chattel; then either the chattel itself, or the proceeds of the chattel, whether the chattel has been rightfully or wrongfully disposed of, may be followed at any time, although either the chattel itself, or the money constituting the proceeds of that chattel, may have been mixed and confounded in a mass of the like material.'

Later in his judgment the Lord Justice continued: 'As far as I can judge, the only exception to the general proposition which I have stated is not a real exception, but an apparent exception, for all the cases where it has been held that moneys mixed and confounded, but still existing, in a mass, cannot be followed, may, I think, be resolved into cases where, although there may have been a trust with reference to the disposition of the particular chattel which those moneys subsequently represented, there was no trust, no duty in reference to the moneys themselves beyond the ordinary duty of a man to pay his debts; in other words, that they were cases where the relationship of debtor and creditor had been constituted, instead of the relation either of trustee and *cestui que trust*, or of principal and agent.' This dictum certainly appears to support the proposition that money, the proceeds of trust property, may lose its trust character, but, if so, it would seem to be hardly consistent with the previous quotation. It is to be remembered that if money were to become unidentifiable, and therefore incapable of being followed, the agent would still be the debtor of his principal in respect of it, and it may be that the Lord Justice intended nothing more than that by his words. But, assuming the first to have been Lord Justice Thesiger's meaning, it is submitted

[1] *Ex parte Dale.*

that the cases to which reference is clearly made, entirely fail to bear out any such principle of law. And it would seem as if both Lord Justice Thesiger and Lord Justice Vaughan Williams were attempting to support the decisions in *Whitecomb* v. *Jacob* and the cases which followed it upon a different ground from that given by the judges who decided those cases, and a ground which apparently never presented itself to their minds.

The first case in which *Knatchbull* v. *Hallett* was cited as an authority was that of *Kirkham* v. *Peel*[1], where Sir George Jessel explained that he had not intended his remarks in the previous case to apply to a commission agent or merchant; they were 'confined to the case of a bailee, ordinarily called a factor, who sells single articles, and whose duty it is to remit the necessary proceeds to his principal.'

In the *New Zealand Land Co.* v. *Ruston*[2] the plaintiffs were in the habit of shipping corn from New Zealand, taking bills of lading which made the corn deliverable to them in London, and indorsing these bills to the firm of Mathews and Thielman, merchants and factors of Glasgow, with instructions to sell the corn in London. Mathews and Thielman, having no house of their own in London, indorsed the bills of lading to the defendants, who were extensive factors and brokers in London, for the purposes of sale. When sales were effected, the defendants delivered accounts to Mathews and Thielman, who in turn delivered accounts to the plaintiffs; but the respective terms as to factorage and date of payment were different. The defendants effected sales of the cargoes of three ships, the property of the plaintiffs, and paid the proceeds into their own account with their bankers in the ordinary way, thus mixing up these proceeds with all their receipts from other sources, and from time to time making general remittances to Mathews and Thielman on account. The plaintiffs' claim was for the amount remaining due after deduction of these remittances, but the defendants claimed to set off against the balance in their hands sums due to them from Mathews and Thielman. Field J. decided in the plaintiffs' favour on the ground that they were entitled 'to follow the proceeds of the property in the hands of the defendants in their fiduciary character of agents and trustees.' 'It is,' he said, 'now well and clearly established that a factor, broker, or other mere agent for sale, is in the same position with regard to his principal as all other trustees or bailees who occupy a fiduciary position are with regard to their *cestuis que trust*: *Knatchbull* v. *Hallett*.'

The Court of Appeal overruled this decision[3], not, however, it

[1] 43 L. T. 171. [2] 5 Q. B. D. 481. [3] 7 Q. B. D. 374.

would seem, on the ground that a fiduciary relation may not exist as to money between a merchant and his factor, but that in the actual case under discussion there was neither such a relation nor privity of contract. Bramwell L.J. certainly said: 'Now I do not desire to find fault with the various intricacies and doctrines connected with trusts, but I should be very sorry to see them introduced into commercial transactions, and an agent in a commercial sense turned into a trustee with all the troubles that attend that relation.' But, on the other hand, Baggallay L.J. said: 'There is no question as regards the doctrine well known in equity, which that case[1] illustrates, with respect to property disposed of by persons standing in a fiduciary position, namely, that such property, or the proceeds of it, can be followed if it can be identified, and it is also equally well known that there is no distinction, as regards this doctrine, between an express trustee or an agent or bailee standing in a similar fiduciary position. The mistake is in applying the principle of that case to the present case where there is no fiduciary relation as between the plaintiffs and defendants. The fiduciary relation which exists, if at all, was between the defendants and Mathews and Thielman.'

In *Harris* v. *Truman*[2] the defendants, who were brewers, had entrusted large sums of money to a malting agent to buy barley. The agent had misappropriated the money, but had bought large quantities of barley and malt on credit. A Divisional Court, consisting of Field, Manisty, and Bowen JJ., held that the money paid to the agent constituted a trust fund, and that the trust attached to the barley and malt which the agent had bought, and that accordingly the agent's trustee in bankruptcy was not entitled to seize it. In the course of his judgment Manisty J. said: 'I fail to see any difference between the case of an agent entrusted with goods for the purpose of sale, and an agent entrusted with goods for any other purpose, such as that of converting barley into malt for his principal: see per Jessel M.R. *In re Hallett's Estate.*'

In *Dickson* v. *Murray*[3] a client sent to his solicitor various sums of money to be invested on mortgage. The solicitor did not invest the money as directed, and at his death there were moneys in his hands attributable to certain of the moneys which had been so entrusted to him. It was held that the client was entitled to follow and recover such moneys from the solicitor's representatives.

In *Thomson* v. *Clydesdale Bank*[4], where trustees had handed to their broker certain shares, part of the trust property, for sale, and the broker had sold the shares and paid the money into his

[1] *Knatchbull* v. *Hallett.*
[2] 7 Q. B. D. 340.
[3] 57 L. T. 223.
[4] (1893), A. C. 282.

own account at his bank to which he was heavily indebted, it was argued that on the authority of *Knatchbull* v. *Hallett* the trustees were entitled to follow the money. The House of Lords, however, held that as the money was paid into the bank for onerous consideration, and the bank had no notice of any fraudulent dealing on the part of the broker, the trustees could not follow it; but the judgments contain no suggestion that the trust did not attach to the money as well as to the shares from which the money was derived.

It is therefore submitted, upon the cases as well as upon principle, that, assuming it to be the fact that the Court of Bankruptcy will not apportion to a principal money belonging to him, but being in his factor's custody at the time of the latter's bankruptcy, this is due, not to the loss by the money of its trust character, but, as was suggested by Baggallay L.J. in *Ex parte Cooke* [1], to the difficulty of tracing the money when once it has been mixed with the factor's own moneys. If the cases do raise a question, it is as to where the line should be drawn in importing trust doctrines into ordinary mercantile relations; but, excepting in Lord Justice Thesiger's judgment in *Knatchbull* v. *Hallett*, not a single case appears to support the suggestion that when once a trust is proved to exist between a principal and his agent, the relationship may lapse and revive again according to the various forms into which the property may happen to be converted. It is further submitted that, even if that should be held to be no trust of money as between a merchant and his factor, it is clear from the cases of *Ex parte Cooke* and *Thomson* v. *Clydesdale Bank* that, as between broker and principal, when once a trust is created it will exist until the property is completely dissipated.

It is to be observed that even Lord Justice Thesiger's dictum in *Hallett's* case would not support Lord Justice Williams' proposition to the full extent, for while the latter apparently is willing to go to the length of saying that all property in the hands of a factor loses its trust character when converted into money, the latter allows that in certain cases the trust character would be retained, which indeed it seems difficult to contend against after the decision in *Ex parte Cooke*. Lord Justice Williams' proposition would afford a distinct test of the existence of a fiduciary relationship, but would thus appear to lose the support of the only authority in its favour. Lord Justice Thesiger's proposition would supply no test but the opinion of the Court on the facts of the case before it.

A point of some interest may arise, when the persons between whom a fiduciary relation exists are broker and principal, as to what is the difference—in considering the position of one who has

[1] 4 Ch. D. 123.

received the trust-property for value and in good faith—between bearer securities, registered securities, and money. There are two points to be considered in arriving at a conclusion as to whether the holder of such property is entitled to retain it against the beneficiary. In the first place, did the holder take for value? And in the second, if he took for value, did he take without any grounds for suspicion that the person conveying to him was acting in fraud of the rightful owner? And these questions, it is submitted, will apply as well to registered securities as to bearer securities or money [1], though upon different principles.

In the case of bearer securities the question depends upon the well-known principle that a holder for value of a negotiable instrument who has taken such instrument without notice of any flaw in the title owing to the fraud of his predecessor, takes it freed from any equities by which the title of his predecessor was affected [2]. And the probability is that the holder for value of securities to bearer will rarely be affected with notice.

Money appears to stand upon the same footing as securities to bearer [3].

In the case of registered securities deposited with a broker by way of security, for safe custody, or for sale, it would seem that they also cannot be recovered by the principal when fraudulently disposed of by the broker, if once they have come into the hands of a *bona fide* holder for value [4]. For in this case, it is submitted that the principal, by placing the securities in the hands of his broker, has by his conduct given to the broker an apparent authority to deal with them, and will in consequence be estopped from subsequently denying, as against persons who have purchased without reason to suspect any infirmity in the broker's title, that the broker had the authority which he appeared to have [5]. But in the case

[1] *Sheffield* v. *London Joint Stock Bank*, 13 App. Cas. 341; *Bentinck* v. *London Joint Stock Bank* (1893), 2 Ch. 120.

[2] *Sheffield* v. *London Joint Stock Bank*, 13 App. Cas. 333; *London Joint Stock Bank* v. *Simmons* (1892), A. C. 201.

[3] *Thomson* v. *Clydesdale Bank* (1893), A. C. 282.

[4] An instrument of transfer forged by the broker is an exception to this rule: it is a mere nullity, and gives no title to the transferee.

[5] *London Joint Stock Bank* v. *Simmons* (1892), A. C. 215. On this point section 2 (1) of the Factors Act, 1889 (52 & 53 Vict. c. 45), deserves to be noticed, since, although it is perhaps doubtful whether the Act in point of fact includes brokers, it is submitted that, in respect of the above section at any rate, it merely codified the law previously existing as to all agents when acting with the scope of the authority usually possessed by the class to which they belong. The section is as follows: 'Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.'

of registered securities registration is usually necessary to complete the legal title, and, where that is the case, the title of the purchaser for value will not prevail over an earlier equitable title, unless at the time when he received notice the purchaser had obtained either actual registration, or an unconditional right to be registered [1]. And therefore it is probable that the formalities which usually attend a transfer of registered securities will in most cases prevent the passing of the legal ownership by leading to a discovery of the fraud.

SPENCER BRODHURST.

[1] *Roots* v. *Williamson*, 38 Ch. D. 485; *Moore* v. *North London Bank* (1891), 2 Ch. 599.

AN ACADEMY OF LAW.

WE need no French satirist to tell us that our English institutions discover a plentiful lack of system and symmetry. The impeachment is undeniable, and the reason plain. Those institutions owe their origin, in the main, to independent voluntary effort. A want is felt, an abuse is brought to light, and the reforming energy of the Briton deals with it at once in the directest utilitarian fashion, indifferent to scientific principles or the aesthetic effect on the whole. This English quality of practicality with its empirical methods is illustrated abundantly in our constitutional history, our civic life, our manufacturing industries, our agriculture, our architecture, pre-eminently in our law. That law has grown up like one of our old English manor-houses—pulled down here, patched up there, altered and added to from time to time to suit the changing requirements of society, now throwing out an equity wing, now taking in an old episcopal building in the canon or civil law style, with statutory outbuildings of every description, the whole deriving at the present day a seeming uniformity from the complete coat of stucco given it by the Judicature Acts. The associations which are grouped around this central building of the law make no pretence even to this superficial symmetry or coherence. Mark their number and variety! There are the Inns of Court, with their venerable and picturesque traditions. There is the brand-new Bar Council—zealous guardian of professional interests. There is the much criticized Council of Legal Education. There are the law schools of Oxford, Cambridge, and London. There is the Standing Parliamentary Committee on Law. There is the Law Institution, with its affiliated societies in all the large towns of England. There is the Selden Society. There is the Romilly Society. There is the Incorporated Council of Law Reporting. There is the Marriage Law Reform Association. There is the Bar Benevolent Society, the Solicitor's Benevolent Society, the United Law Clerks' Society, the Hardwick and kindred societies, the Bar Circuits, and many others—all of them useful organizations and doing useful work. Last, not least, there is the illustrious order of Queen's Counsel—the successful men of the profession—the flower of the English Bar. If it were merely that

these organizations were disconnected, with no central co-ordinating authority, the observer might simply smile at the phenomenon as a British idiosyncrasy and pass on. The remarkable thing is, not so much that these organizations are disconnected, but that they all miss or leave untouched the one thing of supreme importance—the heart of the mystery—the science of law and its highest interests. The Bar Council is an excellent trade union. The Council of Legal Education is an incomparable crammer—the whole law of England is done for the law student in six courses of lectures. The Standing Committee on Law polishes the rough blocks of legislation, to fit them into the structure. The Romilly Society is for tinkering the administration of the criminal law. The Selden Society gives us detached, albeit most interesting, documents of legal history, and so on. But not one association of them all is dedicated to the perfecting of the law as a whole, of that which Burke says should be 'the leading science in every well ordered Commonwealth.' Is it with us as Cicero says of some of his contemporaries, 'totum illud displicet, philosophari'? If so, it were a grievous fault, but it is one which may yet be cured, and the remedy is to be found, the present writer ventures to think, in an 'Academy of Law'—in a body which would preside over and unite other organizations, but which above all would represent not so much the interests of lawyers as the highest ideals of the law. It will be said what would such a body do? In the first place it would set its seal upon those who are great lawyers and jurists in the best sense of the term—not lawyers, that is to say, and nothing else, but men who possessing a profound and exact knowledge of law can see the law in its relation to other sciences, to history, and the whole framework of society. Such a body of trained and cultured jurists presiding over the destinies of the law would raise the whole law to a higher level. It would consolidate imperial unity by assimilating the varied systems of law which obtain throughout Her Majesty's wide—and ever widening—dominions. It would speak with a weight and authority which could not be gainsaid, but which at present no legal organization possesses, and for work! why the fields are 'white to harvest.' There is the history of the law, the substance of the law, the form of the law, including codification, and the machinery of the law, based on judicial statistics—each in itself an illimitable field; there are the methods of legal education; there is international law, now being rapidly moulded by the march of events. With all these matters and many others an Academy of Law could and might deal as no other existing body possibly could.

If the Roman jurisconsults could so impress themselves on the

body of the Civil Law, what might we not expect from the combined wisdom of a body of first-rate British jurisconsults? An Academy of Arts is an accomplished fact [1]. An Academy of Letters might be but for the inveterate jealousies of literary genius. Why not an Academy of Law? No such difficulty besets an Academy of Law as it does one of Letters, for whatever the failings of lawyers, they are free from petty jealousy of one another. Fifty men could be at once named, about whose qualifications no possible question could arise and to whom all lawyers would render a willing and loyal allegiance. Of this fifty, fifteen might come from the judicial bench —English, Scottish, and Irish—by co-optation among the judges, six from the bar, six from the ranks of solicitors, six from the professorial world, three from the profession in Scotland, three from the profession in Ireland, and ten from India and the Colonies. Honorary members might also be elected from foreign countries or from the empire; annual meetings held, open to all, and papers read thereat: but details like these must be left till later. All that it is meant to do here is to suggest the idea of such an association as one for which the age is ripe. It is the fashion among some persons to deride what is academic; and if by academic is meant that habit of mind which in its ardour for antiquarian research, for scholastic subtleties or pedantic learning, forgets that the end of all law is a practical one—the conservation and perfecting as far as may be of human society—*salus reipublicae*—this estimate of the pseudo-academic may be a just one, and we may exclaim, like Napoleon on the eve of action in Egypt, 'Professors and asses to the rear!' But inasmuch as the law has a scientific basis, and lawyers like laymen are rapidly learning that to be practical with effect—to legislate or administer wisely—you must first master the principles which govern the silent evolution of law from the social forces around us, the neglect of this study of law as a science is becoming more and more of an anomaly. Time has taken nothing from the truth of Bacon's primary aphorism, 'Homo Naturae minister et interpres tantum facit et intelligit quantum de Naturae ordine re vel mente observaverit, nec amplius scit nec potest.' What we need is an Academy of Law to give us this interpretation of nature for the lawyer, and give it authoritatively.

EDWARD MANSON.

[1] [British artists do not seem to be unanimous in appreciation of its services to the progress of the fine arts in this country.—ED.]

ENGLISH LAW BEFORE THE NORMAN CONQUEST.

FOR most practical purposes the history of English law does not begin till after the Norman Conquest, and the earliest things which modern lawyers are strictly bound to know must be allowed to date only from the thirteenth century, and from the latter half of it rather than the former. Nevertheless a student who does not look farther back will be puzzled by relics of archaic law which were not formally discarded until quite modern times, and he may easily be misled by plausible but incorrect explanations of them, such as have been current in Blackstone's time and much later. In rare but important cases it may be needful for advocates and judges to transcend the ordinary limits of the search for authority, and trace a rule or doctrine to its earliest known form in this country. When this has to be done it is quite possible that wrong ancient history may lead to the declaration of wrong modern law. This happened in at least one celebrated case within the Queen's reign, in which, as it is now hardly possible to doubt, the House of Lords reversed the ancient law of marriage accepted on the authority of the Church in England as well as in the rest of Western Christendom, being misguided by early documents of which they did not rightly understand either the authority or the effect[1]. The extreme antiquities of our law may not be often required in practice, but it is not safe to neglect them altogether, and still less safe to accept uncritical explanations when it does become necessary to consider them.

Anglo-Saxon life was rough and crude as compared not only with any modern standard but with the amount of civilization which survived, or had been recovered, on the Continent. There was very little foreign trade, not much internal traffic, nothing like industrial business of any kind on a large scale, and (it need hardly be said) no system of credit. Such conditions gave no room for refined legal science applied by elaborate legal machinery, such as those of the Roman Empire had been and those of modern England and the commonwealths that have sprung from her were to be. Such as the men were, such had to be the rules and methods

[1] See Pollock and Maitland, Hist. Eng. Law, ii. 367 sqq.

whereby some kind of order was kept among them. Our ancestors before the Norman Conquest lived under a judicial system, if system it can be called, as rudimentary in substance as it was cumbrous in form. They sought justice, as a rule, at their primary local court, the court of the hundred, which met once a month, and for greater matters at a higher and more general court, the county court, which met only twice a year[1]. We say purposely met rather than sat. The courts were open-air meetings of the freemen who were bound to attend them, the *suitors* as they are called in the terms of Anglo-Norman and later medieval law; there was no class of professional lawyers; there were no judges in our sense of learned persons specially appointed to preside, expound the law, and cause justice to be done; the only learning available was that of the bishops, abbots, and other great ecclesiastics. This learning, indeed, was all the more available and influential because, before the Norman Conquest, there were no separate ecclesiastical courts in England. There were no clerks nor, apparently, any permanent officials of the popular courts; their judgments proceeded from the meeting itself, not from its presiding officer, and were regularly preserved only in the memory of the suitors. A modern student or man of business will at first sight wonder how this rude and scanty provision for judicial affairs can have sufficed even in the Dark Ages. But when we have reflected on the actual state of Anglo-Saxon society, we may be apt to think that at times the hundred and the county court found too little to do rather than too much. The materials for what we now call civil business practically did not exist.

There is now no doubt among scholars that the primary court was the hundred court. If the township had any regular meeting (which is quite uncertain), that meeting was not a judicial body. The King, on the other hand, assisted by his Council of wise men, the Witan[2], had a superior authority in reserve. It was allowable to seek justice at the king's hands if one had failed, after due diligence, to obtain it in the hundred or the county court. Moreover the Witan assumed jurisdiction in the first instance where land granted by the king was in question, and perhaps in other cases where religious foundations or the king's great men were concerned. Several examples of such proceedings are recorded, recited as we should say in modern technical speech, in extant land-charters which declare and confirm the result of disputes, and therefore we know more of them than we do of the ordinary proceedings in the

[1] There were probably intermediate meetings for merely formal business, which only a small number of the suitors attended: see P. & M., Hist. Eng. L. i. 526.

[2] There is more authority for this short form than for the fuller Witena-Gemót (not witenágemot as sometimes mispronounced by persons ignorant of Old-English inflexions).

county and hundred courts, of which no written record was kept. But they can have had very little bearing, if any, on the daily lives of the smaller folk. In important cases the county court might be strengthened by adding the chief men of other counties; and, when thus reinforced, there is hardly anything to distinguish it from the Witan save that the king is not there in person[1].

Some considerable time before the Norman Conquest, but how long is not known, bishops and other great men had acquired the right of holding courts of their own and taking the profits in the shape of fines and fees, or what would have been the king's share of the profits. My own belief is that this began very early, but there is no actual proof of it. Twenty years after the Conquest, at any rate, we find private jurisdiction constantly mentioned in the Domesday Survey, and common in every part of England: about the same time, or very shortly afterwards, it was recognized as a main ingredient in the complex and artificial system of feudalism. After having grown in England, as elsewhere, to the point of threatening the king's supremacy, but having happily found in Edward I a master such as it did not find elsewhere before the time of Richelieu, the manorial court is still with us in a form attenuated almost to the point of extinction. It is not material for the later history of English law to settle exactly how far the process of concession or encroachment had gone in the time of Edward the Confessor, or how fast its rate was increasing at the date of the Conquest. There can be no doubt that on the one hand it had gained and was gaining speed before 'the day when King Edward was alive and dead[2],' or on the other hand that it was further accelerated and emphasized under rulers who were familiar with a more advanced stage of feudalism on the Continent. But this very familiarity helped to make them wise in time; and there was at least some foreshadowing of royal supremacy in existing English institutions. Although the courts of the hundred and the county were not the king's courts, the king was bound by his office to exercise some general supervision over their working. He was represented in the county court by the sheriff; he might send out commissioners to inquire and report how justice was done, though he could not interfere with the actual decisions. The efficiency of these powers varied in fact according to the king's means and capacity for exercising them. Under a wise and strong ruler like Alfred or Æthelstan they might count for much; under a feeble one like Æthelred they could count for very little.

[1] Such a court, after the Conquest, was that which restored and confirmed the rights of the see of Canterbury on Penenden Heath: but it was held under a very special writ from the king.

[2] The common form of reference in Domesday Book.

A modern reader fresh to the subject might perhaps expect to find that the procedure of the old popular courts was loose and informal. In fact it was governed by traditional rules of the most formal and unbending kind [1]. Little as we know of the details, we know enough to be sure of this; and it agrees with all the evidences we have of the early history of legal proceedings elsewhere. The forms become not less but more stringent as we pursue them to a higher antiquity; they seem to have not more but less appreciable relation to any rational attempt to ascertain the truth in disputed matters of fact. That task, indeed, appears to have been regarded as too hard or too dangerous to be attempted by unassisted human faculties. All the accustomed modes of proof involved some kind of appeal to supernatural sanctions. The simplest was the oath of one of the parties, not by way of testimony to particular facts, but by way of assertion of his whole claim or defence; and this was fortified by the oaths of a greater or less number of helpers, according to the nature of the case and the importance of the persons concerned, who swore with him that his oath was true [2]. He lost his cause without a chance of recovery if any slip was made in pronouncing the proper forms, or if a sufficient number of helpers were not present and ready to make the oath. On the other hand the oath, like all archaic forms of proof, was conclusive when once duly carried through. Hence it was almost always an advantage to be called upon to make the oath of proof, and this usually belonged to the defendant. 'Gainsaying is ever stronger than affirming . . . Owning is nearer to him who has the thing than to him who claims [3].' Our modern phrase 'burden of proof' is quite inapplicable to the course of justice in Anglo-Saxon courts: the benefit or 'prerogative' of proof, as it is called even in modern Scottish books, was eagerly contended for. The swearer and his oath-helpers might perjure themselves, but if they did there was no remedy for the loser in this world, unless he was prepared to charge the court itself with giving false judgment. Obviously there was no room in such a scheme for what we now call rules of evidence. Rules there were, but they declared what number of oath-helpers was required, or how many common men's oaths would balance a thegn's. In the absence of manifest facts, such as a fresh wound, which could be

[1] There were variations in the practice of different counties after the Conquest (Glanv. xii. 23), and therefore, almost certainly, before. We know nothing of their character or importance, but I should conjecture that they were chiefly in verbal formulas.

[2] Advanced students will observe that this is wholly different from the decisory oath of Roman and modern Romanized procedure, where one party has the option of tendering the oath to the other alone, and is bound by the result.

[3] Æthelr. ii. 9.

shown to the court, an oath called the 'fore-oath' was required of the complainant in the first instance as a security against frivolous suits. This was quite different from the final oath of proof.

Oath being the normal mode of proof in disputes about property, we find it supplemented by ordeal in criminal accusations. A man of good repute could usually clear himself by oath; but circumstances of grave suspicion in the particular case, or previous bad character, would drive the defendant to stand his trial by ordeal. In the usual forms of which we read in England the tests were sinking or floating in cold water[1], and recovery within a limited time from the effects of plunging the arm into boiling water or handling red-hot iron. The hot-water ordeal at any rate was in use from an early time, though the extant forms of ritual, after the Church had assumed the direction of the proceedings, are comparatively late. Originally, no doubt, the appeal was to the god of water or fire, as the case might be. The Church objected, temporized, hallowed the obstinate heathen customs by the addition of Christian ceremonies, and finally, but not until the thirteenth century, was strong enough to banish them. As a man was not put to the ordeal unless he was disqualified from clearing himself by oath for one of the reasons above mentioned, the results were probably less remote from rough justice than we should expect, and it seems that the proportion of acquittals was also larger. Certainly people generally believed to be guilty did often escape, how far accidentally or otherwise we can only conjecture[2]. Another form of ordeal favoured in many Germanic tribes from early times, notwithstanding protest from the Church, and in use for deciding every kind of dispute, was trial by battle: but this makes its first appearance in England and Scotland not as a Saxon but as a distinctly Norman institution[3]. It is hard to say why, but the fact is so. It seems from Anglo-Norman evidence that a party to a dispute which we should now call purely civil sometimes offered to prove his case not only by oath or combat, but by ordeal, as the court might award. This again suggests various explanations of which none is certain[4].

[1] There is a curious French variant of the cold-water ordeal in which not the accused person, but some bystander taken at random, is immersed: I do not know of any English example.

[2] The cold-water ordeal was apparently most feared; see the case of Ailward, Materials for Hist. St. Thomas, i. 156, ii. 172; Bigelow, Plac. A.-N. 260. For a full account see Lea, Superstition and Force.

[3] See more in Neilson, Trial by Combat, an excellent and most interesting monograph.

[4] Cases from D. B. collected in Bigelow, Plac. A.-N., 40-44, 61. Even under Henry II we find, in terms, such an offer, but it looks, in the light of the context, more like a rhetorical asseveration—in fact the modern 'j'en mettrais ma main au feu'—than anything else: *op. cit.* 196.

Inasmuch as all the early modes of proof involved large elements of unknown risk, it was rather common for the parties to compromise at the last moment. Also, since there were no ready means of enforcing the performance of a judgment on unwilling parties, great men supported by numerous followers could often defy the court, and this naturally made it undesirable to carry matters to extremity which, if both parties were strong, might mean private war. Most early forms of jurisdiction, indeed, of which we have any knowledge, seem better fitted to put pressure on the litigants to agree than to produce an effective judgment of compulsory force. Assuredly this was the case with those which we find in England even after the consolidation of the kingdom under the Danish dynasty.

Rigid and cumbrous as Anglo-Saxon justice was in the things it did provide for, it was, to modern eyes, strangely defective in its lack of executive power. Among the most important functions of courts as we know them is compelling the attendance of parties and enforcing the fulfilment both of final judgments and of interlocutory orders dealing with the conduct of proceedings and the like. Such things are done as of course under the ordinary authority of the court, and with means constantly at its disposal; open resistance to judicial orders is so plainly useless that it is seldom attempted, and obstinate preference of penalties to submission, a thing which now and then happens, is counted a mark of eccentricity bordering on unsoundness of mind. Exceptional difficulties, when they occur, indicate an abnormal state of the commonwealth or some of its members. But this reign of law did not come by nature; it has been slowly and laboriously won. Jurisdiction began, it seems, with being merely voluntary, derived not from the authority of the State but from the consent of the parties. People might come to the court for a decision if they agreed to do so. They were bound in honour to accept the result; they might forfeit pledges deposited with the court; but the court could not compel their obedience any more than a tribunal of arbitration appointed at this day under a treaty between sovereign States can compel the rulers of those States to fulfil its award. Anglo-Saxon courts had got beyond this most early stage, but not very far beyond it.

The only way to bring an unwilling adversary before the court was to take something of his as security till he would attend to the demand; and practically the only things that could be taken without personal violence were cattle. Distress in this form was practised and also regulated from a very early time. It was forbidden to distrain until right had been formally demanded—in Cnut's time to the extent of three summonings—and refused.

Thus leave of the court was required, but the party had to act for himself as best he could. If distress failed to make the defendant appear, the only resource left was to deny the law's protection to the stiff-necked man who would not come to be judged by law. He might be outlawed, and this must have been enough to coerce most men who had anything to lose and were not strong enough to live in rebellion; but still no right could be done to the complainant without his submission. The device of a judgment by default, which is familiar enough to us, was unknown, and probably would not have been understood.

Final judgment, when obtained, could in like manner not be directly enforced. The successful party had to see to gathering the 'fruits of judgment,' as we say, for himself. In case of continued refusal to do right according to the sentence of the court, he might take the law into his own hands, in fact wage war on his obstinate opponent. The ealdorman's aid, and ultimately the king's, could be invoked in such extreme cases as that of a wealthy man, or one backed by a powerful family, setting the law at open defiance. But this was an extraordinary measure, analogous to nothing in the regular modern process of law.

The details of Anglo-Saxon procedure and judicial usage had become or were fast becoming obsolete in the thirteenth century, which is as much as to say that they were already outworn when the definite growth of the Common Law began. But the general features of the earlier practice, and still more the ideas that underlay them, have to be borne in mind. They left their stamp on the course of our legal history in manifold ways; many things in the medieval law cannot be understood without reference to them; and even in modern law their traces are often to be found.

While the customary forms of judgment and justice were such as we have said, there was a comparatively large amount of legislation or at least express declaration of law; and, what is even more remarkable, it was delivered in the mother tongue of the people from the first. Æthelberht, the converted king of Kent, was anxious to emulate the civilization of Rome in secular things also, and reduced the customs of his kingdom, so far as might be, to writing; but they were called *dooms*, not *leges*; they were issued in English, and were translated into Latin only after the lapse of some centuries. Other Kentish princes, and afterwards Ine of Wessex, followed the example; but the regular series of Anglo-Saxon laws begins towards the end of the ninth century with Alfred's publication of his own dooms, and (it seems) an amended version of Ine's, in which these are now preserved. Through the century and a half

between Alfred's time and Cnut's [1] legislation was pretty continuous, and it was always in English. The later restoration of English to the statute roll after the medieval reign of Latin and French was not the new thing it seemed. It may be that the activity of the Wessex princes in legislation was connected with the conquest of the Western parts of England, and the need of having fixed rules for the conduct of affairs in the newly settled districts. No one doubts that a considerable West-Welsh population remained in this region, and it would have been difficult to apply any local West-Saxon custom to them.

Like all written laws, the Anglo-Saxon dooms have to be interpreted in the light of their circumstances. Unluckily for modern students, the matters of habit and custom which they naturally take for granted are those of which we now have least direct evidence. A large part of them is filled by minute catalogues of the fines and compositions payable for manslaughter, wounding, and other acts of violence. We may well suppose that in matters of sums and number such provisions often express an authoritative compromise between the varying though not widely dissimilar usages of local courts; at all events we have an undoubted example of a like process in the fixing of standard measures after the Conquest; and in some of the later Anglo-Saxon laws we get a comparative standard of Danish and English reckoning. Otherwise we cannot certainly tell how much is declaration of existing custom, or what we should now call consolidation, and how much was new. We know from Alfred's preamble to his laws, evidently framed with special care, that he did innovate to some extent, but, like a true father of English statesmen, was anxious to innovate cautiously. On the whole the Anglo-Saxon written laws, though of priceless use to students of the times, need a good deal of circumspection and careful comparison of other authorities for using them aright. It is altogether misleading to speak of them as codes, or as if they were intended to be a complete exposition of the customary law.

We pass on to the substance of Anglo-Saxon law, so far as capable of being dealt with in a summary view. There were sharp distinctions between different conditions of persons, noble, free, and slave. We may talk of 'serfs' if we like, but the Anglo-Saxon 'theow' was much more like a Roman slave than a medieval villein. Not only slaves could be bought and sold, but there was so much regular slave-trading that selling men beyond seas had to

[1] The so-called laws of Edward the Confessor, an antiquarian compilation of the twelfth century largely mixed with invention, do not even profess to be actual poems of the Confessor, but the customs of his time collected by order of William the Conqueror.

be specially forbidden. Slaves were more harshly punished than free men, and must have been largely at their owner's mercy, though there is reason to think that usage had a more advanced standard of humanity than was afforded by any positive rules. Manumission was not uncommon, and was specially favoured by the Church. The slave had opportunities (perhaps first secured under Alfred) for acquiring means of his own, and sometimes bought his freedom.

Among free men there were two kinds of difference. A man might be a lord having dependents, protecting them and in turn supported by them, and answerable in some measure for their conduct; or he might be a free man of small estate dependent on a lord. In the tenth century, if not before, every man who was not a lord himself was bound to have a lord on pain of being treated as unworthy of a free man's rights; 'lordless man' was to Anglo-Saxon ears much the same as 'rogue and vagabond' to ours. This wide-spread relation of lord and man was one of the elements that in due time went to make up feudalism. It was not necessarily associated with any holding of land by the man from the lord, but the association was doubtless already common a long time before the Conquest, and there is every reason to think that the legally uniform class of dependent free men included many varieties of wealth and prosperity. Many were probably no worse off than substantial farmers, and many not much better than slaves.

The other legal difference between free men was their estimation for *wergild*, the 'man's price' which a man's kinsfolk were entitled to demand from his slayer, and which sometimes he might have to pay for his own offences; and this was the more important because the weight of a man's oath also varied with it. A *thegn* (which would be more closely represented by 'gentilhomme' than by 'nobleman') had a wergild six times as great as a *ceorl's*[1] or common man's, and his oath counted for six common oaths before the court[2]. All free men, noble or simple, looked to their kindred as their natural helpers and avengers; and one chief office of early criminal law was to regulate the blood-feud until there was a power strong enough to supersede it.

We collect from the general tenor of the Anglo-Saxon laws that the evils most frequently calling for remedy were manslaying, wounding, and cattle-stealing; it is obvious enough that the latter,

[1] The modern forms of these words, *thane* and *churl*, have passed through so much change of meaning and application that they cannot be safely used for historical purposes.

[2] There were minor distinctions between ranks of free men which are now obscure, and were probably no less obscure in the thirteenth century: they seem to have been disregarded very soon after the Conquest.

when followed by pursuit in hot blood, was a natural and prolific source of the two former. The rules dealing with such wrongs or crimes (for archaic laws draw no firm line between public offence and private injury) present a strange contrast of crude ideas and minute specification, as it appears at first sight. Both are however really due to similar conditions. A society which is incapable of refined conceptions, but is advanced enough to require equal rules of some kind and to limit the ordinary power of its rulers, is likewise incapable of leaving any play for judicial discretion. Anglo-Saxon courts had not the means of apportioning punishment to guilt in the particular case, or assessing compensation according to the actual damage, any more than of deciding on the merits of conflicting claims according to the evidence. Thus the only way remaining open was to fix an equivalent in money or in kind for each particular injury: so much for life and so much for every limb and member of the human body. The same thing occurs with even greater profusion of detail in the other Germanic compilations of the Dark Ages. In the latter days of Anglo-Saxon monarchy treason was added to the rude catalogue of crimes, under continental influence ultimately derived from Roman law; but the sin of plotting against the sovereign was the more readily conceived as heinous above all others by reason of the ancient Germanic principle of faith between a lord and his men. This prominence of the personal relation explains why down to quite modern times the murder of a husband by his wife, of a master by his servant, and of an ecclesiastical superior by a clerk, secular or regular, owing him obedience, were specially classed as 'petit treason' and distinguished from murder in general[1].

Secret murder as opposed to open slaying was treated with special severity. This throws no light on our later criminal law; nor has it much to do with love of a fair fight, though this may have strengthened the feeling; rather it goes back to a time when witchcraft, and poisoning as presumably connected therewith, were believed to be unavoidable by ordinary caution, and regarded with a supernatural horror which is still easy to observe among barbarous people. With these exceptions, and a few later ones of offences reserved for the king's jurisdiction, crimes were not classified or distinguished in Anglo-Saxon custom save by the amount of public fine[2] and private composition required to redeem the wrong-doer's life in each case. Capital punishment and money

[1] Bl. Com. iv. 203.

[2] *Wite* was probably, in its origin, rather a fee to the court for arranging the composition than a punishment. But it is treated as penal from the earliest period of written laws. In the tenth century it could mean pain or torment; see C. D. 1222 *ad fin.*

payment, or rather liability to the blood-feud redeemable by money payment, and slavery for a thief who could not make the proper fine, were the only means of compulsion generally applicable, though false accusers and some other infamous persons were liable to corporal penalties. Imprisonment is not heard of as a substantive punishment; and it is needless to say that nothing like a system of penal discipline was known. We cannot doubt that a large number of offences, even notorious ones, went unpunished. The more skilled and subtle attacks on property, such as forgery and allied kinds of fraud, did not occur, not because men were more honest, but because fraudulent documents could not be invented or employed in a society which knew nothing of credit and did not use writing for any common business of life.

Far more significant for the future development of English law are the beginnings of the King's Peace. In later times this became a synonym for public order maintained by the king's general authority; nowadays we do not easily conceive how the peace which lawful men ought to keep can be any other than the Queen's or the commonwealth's. But the king's justice, as we have seen, was at first not ordinary but exceptional, and his power was called to aid only when other means had failed. To be in the king's peace was to have a special protection, a local or personal privilege. Every free man was entitled to peace in his own house, the sanctity of the homestead being one of the most ancient and general principles of Teutonic law. The worth set on a man's peace, like that of his life, varied with his rank, and thus the king's peace was higher than any other man's. Fighting in the king's house was a capital offence from an early time. Gradually the privileges of the king's house were extended to the precincts of his court, to the army, to the regular meetings of the shire and hundred, and to the great roads. Also the king might grant special personal protection to his officers and followers; and these two kinds of privilege spread until they coalesced and covered the whole ground. The more serious public offences were appropriated to the king's jurisdiction; the king's peace was used as a special sanction for the settlement of blood-feuds, and was proclaimed on various solemn occasions; it seems to have been specially prominent—may we say as a 'frontier regulation'?—where English conquest and settlement were recent[1]. In the generation before the Conquest it was, to all appearance, extending fast. In this kind of development the first stage is a really exceptional right; the second is a right which has to be distinctly claimed, but is open to all who will claim it in the proper form; the third is the 'common right' which the courts

[1] See the customs of Chester, D. B. i. 262 b, extracted in Stubbs, Sel. Ch.

will take for granted. The Normans found the king's peace nearing, if not touching, the second stage.

Except for a few peculiar provisions, there is nothing in Anglo-Saxon customs resembling our modern distinctions between wilful, negligent, and purely accidental injuries. Private vengeance does not stop to discriminate in such matters, and customary law which started from making terms with the avenger could not afford to take a more judicial view. This old harshness of the Germanic rules has left its traces in the Common Law down to quite recent times. A special provision in Alfred's laws recommends a man carrying a spear on his shoulder to keep the point level with the butt; if another runs on the point so carried, only simple compensation at most[1] will be payable. If the point has been borne higher (so that it would naturally come in a man's face), this carelessness may put the party to his oath to avoid a fine. If a dog worried or killed any one, the owner was answerable in a scale of fines rising after the first offence[2]; the indulgence of the modern law which requires knowledge of the dog's habits was unknown. But it may be doubted whether these rules applied to anything short of serious injury. Alfred's wise men show their practical sense by an explanatory caution which they add: the owner may not set up as an excuse that the dog forthwith ran away and was lost. This might otherwise have seemed an excellent defence according to the archaic notion that the animal or instrument which does damage carries the liability about with it, and the owner may free himself by abandoning it (*noxa caput sequitur*)[3].

We have spoken of money payments for convenience; but it does not seem likely that enough money was available, as a rule, to pay the more substantial wergilds and fines; and it must once have been the common practice for the pacified avenger to accept cattle, arms, or valuable ornaments, at a price agreed between the parties or settled by the court. The alternative of delivering cattle is expressly mentioned in some of the earlier laws.

As for the law of property, it was rudimentary, and inextricably mixed up with precautions against theft and charges of theft. A prudent buyer of cattle had to secure himself against the possible claim of some former owner who might allege that the beasts had been stolen. The only way to do this was to take every step in public and with good witness. If he set out on a journey to a fair, he would let his neighbours know it. When he did business either far or near, he would buy only in open market and before credible persons, and, if the sale were at any distance from home, still more

[1] Ælf. 36. The statement is rather obscure.
[2] Ælf. 23.
[3] See Holmes, The Common Law, 7–12.

if he had done some trade on the way without having set out for the purpose, he would call the good men of his own township to witness when he came back driving his newly-gotten oxen, and not till then would he turn them out on the common pasture. These observances, probably approved by long-standing custom, are prescribed in a whole series of ordinances on pain of stringent forfeitures[1]. Even then a purchaser whose title was challenged had to produce his seller, or, if he could not do that, clear himself by oath. The seller might produce in turn the man from whom he had bought, and he again might do the like; but this process ('vouching to warranty' in the language of later medieval law) could not be carried more than three steps back, to the 'fourth hand' including the buyer himself. All this has nothing to do with the proof of the contract in case of a dispute between the original parties to the sale; it is much more aimed at collusion between them, in fact at arrangements for the receipt and disposal of stolen goods. The witnesses to the sale are there not for the parties' sake, but as a check in the public interest. We are tempted at first sight to think of various modern enactments that require signature or other formalities as a condition of particular kinds of contracts being enforceable; but their provisions belong to a wholly different category.

Another archaic source of anxiety is that borrowed arms may be used in a fatal fight and bring the lender into trouble. The early notion would be that a weapon used for manslaying should bring home the liability with it to the owner, quite regardless of any fault; which would afterwards become a more or less rational presumption that he lent it for no good purpose. Then the risk of such weapons being forfeited continued even to modern times. Hence the armourer who takes a sword or spear to be repaired, and even a smith who takes charge of tools, must warrant their return free from blood-guiltiness, unless it has been agreed to the contrary[2]. We also find, with regard to the forfeiture of things which 'move to death,' that even in case of pure accident, such as a tree falling on a woodman, the kindred still have their rights. They may take away the tree if they will come for it within thirty days[3].

There was not any law of contract at all, as we now understand it. The two principal kinds of transaction requiring the exchange or acceptance of promises to be performed in the future were marriage and the payment of wergild. Apart from the general sanctions of the Church, and the king's special authority where his peace had been declared, the only ways of adding any definite security to a promise were oath and giving of pledges. One or

[1] See especially Edg. iv. 6-11. [2] Ælf. 19. [3] Ælf. 13.

both of these were doubtless regularly used on solemn occasions like the settlement of a blood-feud; and we may guess that the oath, which at all events carried a spiritual sanction, was freely resorted to for various purposes. But business had hardly got beyond delivery against ready money between parties both present, and there was not much room for such confidence as that on which, for example, the existence of modern banking rests. How far the popular law took any notice of petty trading disputes, such as there were, we are not informed; it seems likely that for the most part they were left to be settled by special customs of traders, and possibly by special local tribunals in towns and markets. Merchants trafficking beyond seas, in any case, must have relied on the customs of their trade and order rather than the cumbrous formal justice of the time.

Anglo-Saxon landholding has been much discussed, but is still imperfectly understood, and our knowledge of it, so far from throwing any light on the later law, depends largely on what can be inferred from Anglo-Norman sources. It is certain that there were a considerable number of independent free men holding land of various amounts down to the time of the Conquest. In the eastern counties some such holdings, undoubtedly free, were very small indeed [1]. But many of the lesser free men were in practical subjection to a lord who was entitled to receive dues and services from them; he got a share of their labour in tilling his land, rents in money and kind, and so forth. In short they were already in much the same position as those who were called villeins in the twelfth and thirteenth centuries. Also some poor free men seem to have hired themselves out to work for others from an early time [2]. We know next to nothing of the rules under which free men, whether of greater or lesser substance, held 'folk-land,' that is, estates governed by the old customary law. Probably there was not much buying and selling of such land. There is no reason to suppose that alienation was easier than in other archaic societies, and some local customs found surviving long after the Conquest point to the conclusion that often the consent of the village as well as of the family was a necessary condition of a sale. Indeed it is not certain that folk-land, generally speaking, could be sold at all. There is equally no reason to think that ordinary free landholders could dispose of their land by will, or were in the habit of making wills for any purpose. Anglo-Saxon wills (or rather documents more like a modern will than a modern deed) exist, but they are the wills of great folk, such as were accustomed to witness the king's charters, had their own wills witnessed or confirmed by bishops

[1] Maitland, Domesday Book and Beyond, 106. [2] Ælf. 43.

and kings, and held charters of their own; and it is by no means clear that the lands dealt with in these wills were held as ordinary folk-land. In some cases it looks as if a special licence or consent had been required; we also hear of persistent attempts by the heirs to dispute even gifts to great churches[1].

Soon after the conversion of the south of England to Christianity, English kings began to grant the lordship and revenues of lands, often of extensive districts, to the Church, or more accurately speaking to churches, by written charters framed in imitation of continental models. Land held under these grants by charter or 'book,' which in course of time acquired set forms and characters peculiar to England, was called *bookland*, and the king's bounty in this kind was in course of time extended to his lay magnates. The same extraordinary power of the king, exercised with the witness and advice[2] of his witan, which could confer a title to princely revenues, could also confer large disposing capacities unknown to the customary law; thus the fortunate holder of bookland might be and often was entitled not only to make a grant in his lifetime or to let it on such terms as he chose, but also to leave it by will. My own belief is that the land given by the Anglo-Saxon wills which are preserved was almost always bookland even when it is not so described. Indeed these wills are rather in the nature of postponed grants, as in Scotland a 'trust disposition' had to be till quite lately, than of a true last will and testament as we now understand it. They certainly had nothing to do with the Roman testament[3].

Long before the Conquest it had become the ambition of every man of substance to hold bookland, and we may well think that this was on the way to become the normal form of land-ownership. But this process, whatever its results might have been, was broken off by the advent of Norman lords and Norman clerks with their own different set of ideas and forms.

The various customs of inheritance that are to be found even to this day in English copyholds, and to a limited extent in freehold land, and which are certainly of great antiquity, bear sufficient witness that at least as much variety was to be found before the Conquest. Probably the least usual of the typical customs was primogeniture; preference of the youngest son, ultimogeniture or junior-right as recent authors have called it, the 'borough-English' of our post-Norman books, was common in some parts; preference

[1] See C. D. 226 compared with 256.

[2] A strictly accurate statement in few words is hardly possible. See the section 'Book-land and Folk-land' in Maitland, Domesday Book and Beyond, p. 244 sqq.

[3] See P. & M., Hist. Eng. L., bk. II. c. vi. § 3.

of the youngest daughter, in default of sons, or even of the youngest among collateral heirs, was not unknown. But the prevailing type was equal division among sons, not among children including daughters on an equal footing as modern systems have it[1]. Here again the effect of the Norman Conquest was to arrest or divert the native lines of growth. In this country we now live under laws of succession derived in part from the military needs of Western Europe in the early Middle Ages, and in part from the cosmopolitan legislation of Justinian, the line between the application of the two systems being drawn in a manner which is accounted for by the peculiar history of our institutions and the relations between different jurisdictions in England, but cannot be explained on any rational principle. But the unlimited freedom of disposal by will which we enjoy under our modern law has reduced the anomalies of our intestate succession to a matter of only occasional inconvenience.

Small indeed, it is easy to perceive, is the portion of Anglo-Saxon customs which can be said to have survived in a recognizable form. This fact nevertheless remains compatible with a perfectly real and living continuity of spirit in our legal institutions.

FREDERICK POLLOCK.

[This paper deals, to a considerable extent, with the same matter as the chapter on Anglo-Saxon Law in P. & M., Hist. Eng. L. But the treatment is somewhat different, for reasons which will appear whenever it is published in its intended context.]

[1] The discussion which would be necessary if we were here studying Germanic customs for their own sake, or as part of a comparative study of archaic customs in general, is deliberately left aside as irrelevant to the purpose in hand.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

Law and Politics in the Middle Ages. By Edward Jenks. London: John Murray. 1898. 8vo. xiii and 352 pp. (12*s.*)

It is no easy task that Mr. Jenks has set himself in this book. The subject—the connexion between mediaeval law and politics—is vast and intricate: there are large gaps in our knowledge, and the ascertained facts are involved in an obscurity which at once provokes speculation and veils its abundant dangers. The author's special aim—'to separate from the mass of mediaeval history those institutions and ideas which were destined for the future, to distinguish them from survivals which belonged to the past'—demands a rare combination of legal and historical learning, a mastery of detail, and a capacity for generalization, balanced by caution and sobriety of judgment, which were the distinctive qualifications of Sir Henry Maine, but which comparatively few other scholars have possessed. To follow in the steps of Sir Henry Maine is evidently the ambition of Mr. Jenks, and if it is too much to say that the mantle of that great scholar has descended entire upon the shoulders of his follower, it may at least be recognized that in breadth of view, in force and clearness of presentment, as well as in strict adherence to the comparative method, the younger student has successfully imitated his predecessor.

Mr. Jenks enjoys the great advantage—an advantage specially important from the literary point of view—of supporting a definite thesis, of knowing just what he intends to prove. He intends, in the first place, 'to show that law, at any rate in the Middle Ages, is not the arbitrary command of authority, but something entirely different.' The Austinian theory is 'helpless to explain the facts' of early law. 'The *Leges Barbarorum* are not enactments but records.' 'Even in the tenth century . . . law was regarded as a truth to be discovered, not as a command to be imposed.' 'Law is declared, it is not made; it is a discovery, a statement of the conditions under which, as wise men have shown, life can be lived, not an arbitrary decree enacting that life shall be lived in a particular way.' Law, in fact, originates in custom, and custom—the custom of the family or clan, even of the early state—is derived from habits, the habits which individuals at first, and groups afterwards, have found conducive to life and comfort. Mr. Jenks even hazards the bold opinion that 'law, at least in its rudimentary state, is older than society.' Whether, while in this condition—the man a law unto himself—it can be called law at all, we need not pause to inquire. It is the origin of law, and not the origin of custom, for which we are in search. 'So far back as records go, law has always been the expres-

sion of social force,' a force based on primitive experience and fear of the untried, justifying itself (it may be) by a supposed superhuman sanction, expressed and formulated in the words of the wise, but not, till far later days, pretending to be the deliberate and conscious utterance of an absolute authority.

In the second place, Mr. Jenks is convinced that the influence of Roman law and the Roman polity on Teutonic communities has been, or is in danger of being, exaggerated. That 'these communities borrowed, in some cases largely, in others much less freely, from an older polity,' he is ready to allow. But 'it was a borrowing, and not an inheritance.' 'To conceive of Teutonic history as an appendage to Roman history is not merely to ride an academic theory to death: it is to indulge in a profound misconception of the capacities of human nature.' This is, perhaps, a little like setting up a straw-man in order to knock him down. Mr. Jenks does not tell us whom he charges with so enormous a theory of Teutonic history; but still, no doubt, a false impression has, to some extent, been created by attributing an excessive importance and influence to that hollow mockery, the Holy Roman Empire. 'The Middle Ages (says Mr. Jenks) were the nursery of the Barbarian; they were the burial-ground of the Roman.' To think that the Roman Empire really survived in its nominal successors is to be enslaved to words: it is 'one of the great sources of error in mediaeval history.' In a passage not devoid of humour, the author likens the Frankish officials, from the emperor downwards, to a party of savages 'disporting themselves in the garments of a shipwrecked crew.' On law, he allows, the adoption of imperial forms and titles had a temporary influence. The *Capitula*, or royal and imperial edicts, 'for some time, no doubt, played a great part in the history of Teutonic law.' But the *Capitula* are not *Leges*: they are 'hot-house plants, due to the stimulus of Roman ideals.' In fact, 'the Frank Empire, in both its stages, was, in a very important sense, a sham empire.' It was, 'from first to last, a great anachronism.' And what is true of the Frankish Empire is—because of the concessions which had to be made to triumphant feudalism—still more true of the Holy Roman Empire, based on the German Kingdom, which followed.

These theses the author develops with great literary skill and an abundance of printed illustration from original texts. The 'Sources' form the subject of his first two chapters—the Anglo-Saxon dooms, the *Leges Barbarorum*, the *Capitula*; then the early text-books, the Mirrors, the *Coutumiers*, the *Landrechte*—the successive stages in the discovery, definition and amplification of early law. The influences at work on this development are described, with the transition from personal or popular to territorial, from feudal to royal. Much importance is attributed to migration and conquest; too little perhaps, in England at least, to the influence of Christian missionaries with a smattering of Roman jurisprudence. Law becomes territorial through feudalism; feudal law is local; it is administered by peers, and in a court; it is incomplete, but is supplemented by the Canon Law and the Law Merchant. Especial attention is devoted to the growth of English law, on which the Norman Conquest—attacking it when still in a backward stage—exercised a decisive influence. Under the Norman and Angevin kings it became territorial, the *lex terrae*; common to all; judicial, the law of a court, declared by judges rather than by legislators. The royal influence, so great under Henry II, was threatened by the weakness of his successors, but was placed on a new and wider basis, as the representative of social force, by Edward I, whose famous phrase is, by the way, somewhat perverted by Mr. Jenks. 'Shall be discussed by all'

is by no means the same thing as 'ab omnibus approbetur.' 'The great problem which lay before the statesmen of the Middle Ages was to devise a machine which should declare and enforce law, uniformly and steadily. The supreme triumph of English statesmanship is, that it solved this problem some five hundred years before the rest of the Teutonic world.'

After dealing with the sources, in other words, with the origin and growth of mediaeval law in general, Mr. Jenks describes the development of the state. Its origin he finds in the war-band, an association organized on principles diametrically opposed to those of the family and the clan. 'The clan is a community of groups, the state a community of individuals.' Granted that the state as an army is the rudimentary idea, it may be doubted whether Mr. Jenks does not press the essentially military nature of the state too far. In his final chapter he finds 'three fundamental social principles at work—the gentile, the military and the contractual principles.' They form the clan, the state, the partnership. 'The member of the state is such because he owes military obedience to its head.' But, surely, if military necessities were the original *raison d'être* of the state, they very soon ceased to be its sole, or even its chief, object and justification. What about the state as the maintainer of order, the developer of civilization? If τὸ ζῆν is the primary motive, τὸ εὖ ζῆν was what made τὸ ζῆν valuable. There is history as well as philosophy in Aristotle. We can agree more heartily in the connexion which Mr. Jenks traces between the clan system and feudalism. The old strife between state and clan breaks out anew between state and fief, and, though originally quite different, the fief comes to be, in the later Middle Ages, something very like the clan. The connexion is especially strong in Scotland and Ireland, where the clan easily adopted a sort of veneer of feudalism, which, rubbing off in course of time, left the original group, little changed, to carry on the same obstinate, but eventually futile warfare with the state. The principle may be carried further. In another form it is the great difficulty of federations; it is at the bottom of demands for Home Rule. To conquer it, the state has sometimes to become a tyrant: concentration—as in Louis XIV's phrase—with its consequence of revolution, has to do duty for real union; while, on the other hand, in Germany clannish feudalism ends in disruption. This conflict between the central and the local powers, primaeval, mediaeval and modern, Mr. Jenks aptly illustrates from the relations between university and colleges at Oxford or Cambridge in the present day.

The Administration of Justice, Land Settlement and Local Units, Possession and Property, Caste and Contract, form the subjects of the succeeding chapters. The earliest notion of justice is the blood-feud, and one of the first steps towards civilization is the substitution of the *wergild*. To enforce this the aid of the state has to be called in: but clan and state for some time share the functions of justice and police. Then the feudal courts interpose between the state and the individual, but the king's 'peace' is stronger than any one else's 'peace'; his methods are better; he enforces appeals (in the mediaeval, not the modern sense); his writs and inquests carry the day. But generally speaking, at the close of the Middle Ages, the judicial functions of the state are still very restricted; only in England has royal justice triumphed by a judicious combination of the central and local systems.

Again, the strength of the clan depends largely on the nature of primitive land-tenure. A discussion on the early Teutonic village leads us into somewhat speculative quagmires, but we emerge into firmer ground when the great landowner appears. How the manor arose we have still, even after all

that Prof. Maitland and others have done for us, to learn, but that its creation is an important step in the establishment of state-control over the land is clear. But, here again, the feudal lord, having, in alliance with the state, broken up the old territorial group, becomes himself in turn the enemy of the state, and the state has much difficulty—a difficulty never fully overcome—in ousting him from the position he has gained. If, throughout this discussion, Mr. Jenks shows a strong tendency to personify the state, and to attribute an almost superhuman wisdom to a long succession of governments, we need not much complain; the indication of the steps and methods by which certain results were actually attained is more important than the question whether these steps and methods were the result of tolerably acute opportunism, or of deliberate and far-sighted intelligence.

Next, the distinction between Possession and Property is carefully drawn out, and we are shown by what steps—gifts to the Church, barter and sale, capture and production, &c.—the notion of property gradually cleared itself up and obtained legal recognition. Here the state again is a potent agent, not so much in establishing property in moveables as in substituting individual for communal property in land. The notion of the 'peace' does not produce property, but has much to do with legislation thereon: theft is treated as a breach of the peace; this is the justification of the Assize of Novel Disseisin and other assizes. Property, though not merely 'possession protected by law'—for they are distinct conceptions—is nevertheless 'the creature of the state.' Similarly the state has intervened to hasten the transition from caste to contract. Manumission is not a contract, but it overthrows class-barriers; an official nobility supersedes the old nobility of descent—but, Mr. Jenks might have observed, soon tends to copy its predecessor, as the fief the clan: the Church is a living protest against the separation of classes. But, if so, why should the author call the religious orders 'an almost complete reproduction of gentile ideas'? I confess I do not understand this; nor how the clan reappears as the Merchant Gild (p. 309). Surely the Gild, as a voluntary or contractual organization, is radically distinct from the family or clan, in which, as you are born, so you remain.

But these are trivial details, not to be considered against so much excellent matter. Mr. Jenks' last chapter summarizes the contents of his book: a valuable appendix gives a list of sources, both categorically and chronologically arranged. More learned persons than the present reviewer will doubtless find errors of detail; such are almost inevitable in so large and comparatively unexplored a field. If a general criticism may be hazarded, it would be that Mr. Jenks, in his anxiety to prove a thesis, to display the strength and continuity of Teutonic influences, and their independence of Rome, has, naturally enough, left aside what is not strictly germane to his subject. The influence of Roman law and polity, of the Church and its principles, on mediaeval society, have elsewhere received ample recognition. Mr. Jenks has not, as I understand, attempted to set forth a complete picture of the forces which moulded early and mediaeval Teutonic civilization, or to balance all these against each other, but rather to show, by tracing another chain of cause and effect, a side generally neglected in the common view. In this I think he has succeeded. He appears to me to have shown good ground for maintaining the theses with which he set out. At all events he has produced a sound and thoughtful as well as a brilliant and suggestive book.

G. W. Prothero.

Township and Borough. Being the Ford Lectures, delivered in the University of Oxford, October Term, 1897: together with an Appendix of Notes relating to the History of the Town of Cambridge. By F. W. MAITLAND, Downing Professor of the Laws of England. 8vo. x and 220 pp. 3 Maps and Views. Cambridge University Press. 1898. (10*s.*)

SINCE *Madox' Firma Burgi* made an epoch in the study of the legal phenomena of town life and institutions in England, we have had too few pieces of exploration into municipal legal antiquities, numerous as are the items recorded in Dr. Gross' excellent and comprehensive bibliography. Here is a little book, which has grown out of the study of a single English borough made for the purpose of a short series of lectures given by the Cambridge Professor of the Laws of England at Oxford. The borough is Cambridge, and the attempt is made to trace the history of the borough-area in its successive legal aspects. Two excellent sketch-maps and a number of lists of tenants at various periods, drawn from original records such as the hundred roll of 1279, the pipe-roll account of the village of 3 Hen. III, the amercements from the pipe-roll of 13 John (eight years earlier), the amercements of 1177 from the pipe-roll of 23 Henry II, the cartulary of St. John's Hospital, the calendar of Mayors and Bailiffs of Cambridge, Domesday Book, &c., really, in tracing minutely the fortunes of every *cultura*, give the reader curious and suggestive glimpses into the history of an English town from Domesday downwards to to-day. From the legal point of view the book is a comment or study upon the points raised or raiseable in the case of the Mayor, Bailiffs, and Burgesses of the Borough of Cambridge against the Warden, Fellows, and Scholars of Merton College in the University of Oxford, at the Guildhall, London, in Hilary Term, 1803; and just as Coke finds a sentence of Lyttelton ample text for a disquisition on any part of English law, so Dr. Maitland has been able to start from the case and give us a little history of the 'borough rights' on the lands within the boundaries of the vill. Part of the champion of the vill of Cambridge was to be allotted and enclosed by Act of Parliament; the question was, in whom lay the lordship of the soil of the waste? The town gained its desire, for Mr. Justice Lawrence directed the jury to find in its favour, and it got about nine acres in lieu of the odds and ends of waste, now enclosed. Probably no substantial injustice was done, but the legal claim of the town was questionable in its origin, and derived its chief strength from laches and legal but inadvertent admissions on the part of the Crown and of certain colleges. Certainly King John's grant to the burgesses of the town, with its appurtenances, to be held for ever of him and his heirs, to them and their heirs, at a rent of £40 blanch and £20 by tale, did not 'mean to confer an ownership of the soil upon a municipal corporation.' 'Neither John nor his chancellor,' as Dr. Maitland aptly says, 'would have understood the terms' of our position. In the first place the corporation, as we conceive it, is a modern conception (rather that of laymen than of lawyers probably). The 'corporateness' of old boroughs was not manufactured, but, like Topsy, grew. 'The borough community is corporate; the village community is not. . . . No accurately exhaustive list of our corporate boroughs ever was or could be made. But in the rough, so it seems to me,' our author goes on, 'the law was right. . . . Corporateness came of urban life.' As to the village of the older time, 'there are in this village both unity and plurality. If I in some sort plead the cause of plurality, this will be because our natural tendency is to over-estimate this unity. No sooner have we allowed, as allow, I think, we must, that the

land belongs to a community, than our modern brains are at work conferring ownership upon a corporation. . . . I cannot see the English village of the remotest days as populous, . . . and I think it no paradox but a very simple truth that the fewer our numbers, the further we are from any constitutional unity. . . . We are tempted to draw inferences about free villages from villages that are not free. . . . We see the village of the thirteenth century. . . . By a mental process we remove the lord and set the villains free. Too often, so it seems to me, we make these changes, and suppose that all else will remain unchanged, that the organization, the by-laws, the court, will remain, though the lord has gone. But does not the village owe much of its compactness to the lord? His hall has become a centre for this little world. If we remove that hall, the village will not be disintegrated, but it will be decentralized. . . . Then I think we underrate the automatism of ancient agriculture and of ancient government. So far as the arable land is concerned, the common-field husbandry, when once it has been started, requires little regulation. We see that in our Cambridge case. In 1803 there was no court, no assembly, which had been habitually regulating the husbandry of the Cambridge field. There lay the difficulty. The truth is that if you have cut a field into acre-strips, given a parcel of dispersed strips to each of many men, and given to each man a right to turn out his beasts on the whole field during a certain part of the year, you have made an arrangement which maintains itself with unhappy ease. . . . As with rights so with duties, equality or proportionality having been established, all manner of problems solve themselves. Simple arithmetic reigns over the village. . . . Legal ideas never reach very far beyond practical needs. . . . A definitely conceived indefiniteness seems the essence of our modern notion of ownership. The owner may do with the land whatever is not forbidden, . . . because nowadays there are hundreds of different uses to which a man may put his land. Remove this possibility, which is the creation of science and art, and is not ownership, as we conceive it, nearly gone? . . . We should remember this when we are tracing the growth of seignorial power. . . . What therefore we have to watch in early times is not the transfer of something, some thing called ownership, from one sort of "units" to another. It is the crystallization round several different centres, and in very different shapes, of that vague "belongs" which contains both public power and private right, power over persons, right in things.'

Again, to take another point, Dr. Maitland notes that one of the great books remaining to be written is The History of the Majority; and he goes on to show the difficulty with which mediaeval opinion encountered the question of elections—'Until men will say plainly that a vote carried by a majority of one is, for certain purposes, every whit as effectual as an unanimous vote, one main contrast between corporate ownership and mere community escapes them.' 'As a test of ownership we are wont,' continues the lecturer, 'to think of alienability. But if the villagers once meditate an alienation of their pasture land [which feeds the beasts needful for tilling the arable, which feeds themselves] the existence of the community is already in jeopardy. As a matter of fact (such is my guess) the ownership of the waste land was in most cases crystallizing round another centre, the lord to whom the village had been booked by the king.'

Touching the borough jurisdiction also, Dr. Maitland has something to say. 'The borough is a vill which is a hundred.' Why? The *civitas* of Cambridge is not in any of the hundreds that converge upon it. 'Why not? Because it is the county's town, the moot-stow, fortress, and port of the republic of Cambridgeshire.' Moreover he proceeds to suggest that when

the Alfredan strongholds were made official centres of new districts, it is possible the great men of the district were bound to keep 'houses and retainers, burg men, *burgenses*, knights in this stronghold and place of refuge.' He notices that where trade becomes great the old champion fields soon become enclosed and cut up and vanish, as Oxford fields no doubt have hundreds of years ago, so that their very memory is lost, and one scarcely realized their whilom existence till Dr. Maitland referred to them, but as Cambridge fields did not till the present century. A hint is thrown out that in the towns as in the boroughs themselves we have a military arrangement, that the wards may be the local companies that make up the town's contingent for the fyrd service, and for garrison duty and police. 'There were 10 wards, 10 *custodiae* in Cambridge.' Sometimes the *aldermen* or heads of these wards became hereditary as in London. The Faringdons found there may be hereditary *lawmen* or doomsmen also.

In his dissection of the history of the Cambridge tenements there is much admirable remark. 'I had some hope of finding a kind of land-owning "patricians," the successors of old hidesmen. It is fading. Already in the twelfth century . . . the market has mobilized the land; the land is in the market. . . . Cambridge does not look as if it had ever been a feudal unit. Still less does it look as if it had ever been a manorial unit. Agrarian unit it cannot help being after a sort.' As to the *gafol*—'In Cambridge we distinguish [correctly] between the *haw gable* paid for houses and the *land gable* paid for arable strips. Less than half our houses, much less than half our acres, make the payment.' It is then shown that the landlord in towns is often quickly reduced to the position of 'the man with a rent-charge,' inasmuch as the burgess by 'custom' makes his will of his tenement, and so renders escheat a rare thing. The king's interest is to back the burgess against the small landlords who cannot afford to pay him so well as the borough will. It is pretty plain that King John by his grant did not mean to abandon the escheats, or his hold upon the waste, and down to the middle of the fourteenth century the legal theory as expressed in the verdict of inquests is, that if a town tenant held of no one else he holds in chief of the king, even though he pays gavel to the men of the town who collect the king's rents of him, but are not his landlords. But now a new thing emerges, and for the first time a distinct assertion is made that the 'men of Cambridge' stand as mesne lords between the king and the people who pay the gavel. The corporation grants mortmain licences, the Mortimer manor is admitted to be 'held of' the corporation. Then come enclosures and the later Stuart days, after which the corporation, free from royal coercion, sinks into a Tory dining-club, and finally the trial of 1803 and its verdict, of which Dr. Maitland finally observes: 'I see no cause to quarrel with the verdict, but . . . we have some cause to quarrel with the quietly made assumption that these [Cambridge] fields [then to be enclosed and allotted] had some manorial lord, that there must be a lord with manorial rights in this waste, rights of a proprietary order. . . . These old county towns do not pass through the manorial phase. The king was their lord but not their manorial lord; in the eleventh century hardly their landlord; the land on which they stood was not *Terra Regis*.'

Into the question whether Cambridge was originally one or two 'towns' our author does not go for lack of evidence, but certainly the map suggests very strongly the possibility of two hamlets having been fused what time the 'port' was established by the bush-wall and ditch enclosing a favourable spot for trade and defence *ad necessitatis refugium* about the bridge, which is in truth (as Dr. Maitland says) the most famous in England, for thousands

that know not the name of Bristol and to whom the fame of London Bridge has never reached are familiar with the name of the city, whose history, as far as its area and landed possessions, has been so ably sketched in these Ford Lectures.

The lawyer will find his account in this ingenious and lively study, and will, no less than the historian, allow that even from a practical point of view it is well to understand as much as one can of the legal and social conditions under which town life in England has grown up. The student will be pleased with the suggestiveness of the inquiries pursued, which the quotations given above may at all events exemplify, and should find the book a convenient starting-point for further research. As far as his materials and the documents accessible to him go Dr. Maitland has gone—

'Daylight and champion discovers not more.'

F. Y. P.

The Monroe Doctrine. By W. F. Reddaway. Cambridge University Press. 1898. 8vo. vii and 162 pp. (*3s. 6d.*)

This little book, a more or less revised academic essay, seems to owe the choice of its subject by the University of Cambridge to the Venezuela controversy of 1895–96. More recent events have given it a fresh interest. It has the great merits of brevity and clearness, and a writer who has not yet taken his Master's degree may well be excused if his sureness of handling and sense of proportion are not quite full-grown. The authorship of the doctrine enunciated in President Monroe's message is now less material than its reception and interpretation; at least Mr. Reddaway does not show that the respective shares of Monroe and John Quincey Adams in its origin have any other than a biographical interest for modern students of American history.

But Mr. Reddaway deserves all praise first for having taken his subject in hand as a real worker and gone to the Record Office as well as to published books; and secondly for being sound, notwithstanding one or two uncertain expressions, on the root of the matter. The Monroe doctrine was not an attempt to lay down a new rule of the law of nations (which the United States had neither the right nor the power to do), but a declaration of policy. But for certain difficulties of detail, such as the British Government not thinking the time quite ripe for the formal recognition of the South American states which had broken off from Spain, it might have been a joint or simultaneous declaration by the United States and England as to the best known branch of the doctrine, that which deprecates European interference with the independence or the form of government of any American community. The two nations were fully agreed that the Holy Alliance must not be allowed to interfere for the purpose of restoring Spanish government in the revolted colonies. To this object, in substance and all but in precise terms, the language of the message is carefully limited. Any more modern application of the policy which dictated that language must by the nature of the case proceed by analogy based, with whatever justification the facts may afford, upon the original example, not by way of exact deduction from a rule.

The other branch of the doctrine, namely, 'that the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European powers,' was not admitted by any European power at the time, and it is difficult to see to what possible cases it was meant to apply,

unless indeed Monroe or Adams feared that some member of the Holy Alliance, Russia for example, might reconquer Mexico or Chile in the name of Spain and then keep it as a colony for herself. The language seems, however, to have implied at the time some sort of theoretical objection to any European state having a footing on American soil, though this is nowhere expressed; and quite recent echoes of such theories may be found. It is to be observed that in the earlier part and down to well past the middle of this century there was in England a strong official school, prevalent at the Colonial Office itself, which regarded the separation of the colonies from the mother country as inevitable and not undesirable. American statesmen acquainted with this fact, as some doubtless were, could not but feel strongly that, if England went out of Canada, no other European power must come in. Actual fresh colonization by any European state on either American continent is at this time clearly out of the question, so that this clause may safely be regarded as in terms obsolete, and the discussion as merely historical.

The supposed application of the Monroe doctrine to the Venezuela boundary question seems to the present writer a comedy—happily it did not become a tragedy—of errors, due to a complicated series of misadventures and misunderstandings. But that matter is now in a way to be reasonably settled, as, but for extraordinary bad luck of many kinds, it might have been forty years ago, and it has accordingly fallen into the background, where it always ought to have been.

It should not be needful to add that Monroe's declaration could not of itself bind succeeding Presidents or Congresses of the United States, whether we take it as an announcement of policy or as an attempt to formulate a rule of reason or expediency on which American policy might be founded. The importance of the 'doctrine' is not to be discovered within the four corners of Monroe's message, but in the practical development of the ideas which it expressed for the first time. American statesmen, as Mr. Reddaway points out, have seldom quoted it in terms. From the American point of view this course appears to us quite wise and sound.

F. P.

The Law and Practice in Bankruptcy. By the Right Hon. Sir Roland Vaughan Williams. Seventh Edition. By E. W. Hansell. London: Stevens & Sons, Lim. and Sweet & Maxwell, Lim. 1898. 8vo. xcvi and 931 pp. (30*s.*)

Mr. Justice Wright, who represents the High Court of Justice when it deals with the winding up of companies and of the estates of bankrupts, has the good fortune to be occupied with two branches of the law which call for frequent editions of the leading books on the two subjects. Mr. Buckley's book on company law has just reached a new edition; the seventh edition of Vol. II of Mr. Palmer's Company Precedents was published last year; the seventh edition of the first volume of the same work is now in the hands of the profession; and a new edition of Lord Justice Vaughan Williams' well-known work on bankruptcy has recently come out. It is with the seventh edition of the Lord Justice's book that we have now to deal. The new bankruptcy cases are many in number and are brought down to January, 1898, at or about which time the author and his editor went to press. The index in its revised form is the work of Mr. R. E. Vaughan Williams, of Lincoln's Inn, who is the son of the author, and it appears to be admirably done. Mr. Hansell, in his short preface, says absolutely nothing about the

great part which he has no doubt taken in the preparation of the new edition, and the Lord Justice, although a great portion of his time is taken up with mastering the intricacies of Chancery appeals, has probably brought his old Bankruptcy experience to bear in aid of the editor's work. As in former editions the Acts and Rules are set out with their respective provisions in numerical order, and with ample but not too ample notes. The seventh edition will be found to be quite equal in quality to those which preceded it, while it only slightly exceeds any of them in bulk.

F. E.

The Real Representative Law, 1897, being Part I of the Land Transfer Act, 1897, and a discussion on administration thereunder. By AMHERST D. TYSSEN, D.C.L. London: William Clowes & Sons, Lim. 1898. 8vo. xv and 132 pp.

THIS is, we believe, the second book which has appeared relating to Part I of the Land Transfer Act, 1897.

The chief feature of the book, however, is the concise treatment of the general law of administration of assets; but although the writer does not deal exhaustively with the construction of Part I of the Act, he nevertheless calls attention to many of the difficulties involved therein.

It is stated (p. 4) that before 1898 the law was imperfect because it did not charge lands with the debts of the deceased. The Act unquestionably has done this, but in order to render administration actions generally unnecessary, which is the main purpose of Part I, nothing more was required than to make the land devolve as assets to the real representative.

Reference is made (p. 40) to the old rule that legacies are not payable out of real estate unless the will so directs; the question, however, whether the Act in any way affects the rule appears to have been ignored.

Where a tenant in tail dies leaving issue inheritable under the entail the author thinks (pp. 16, 17 and 121) that, because the estate tail continues, it will vest, but without affecting beneficial interests, in the real representative of the deceased. Apparently in support of this opinion the author mentions that Crown debts of the ancestor and executions against him affect the estate tail in the hands of his heir; it should, however, be observed that executions affect all persons whom the ancestor might have barred without the assent of another person; hence this argument does not go far to support the author's view.

The key to the construction of an Act lies in the preamble (*Overseers of West Ham* v. *Iles*, 8 App. Cas. 386, 389; *Marquis of Aylesbury's S. E.* 1892, A. C. 356, 361; *Re Duke of Marlborough's Settlement*, 30 Ch. D. 127, 131; *Crowder* v. *Stewart*, 16 Ch. D. 368, 369), and more attention might perhaps have been paid to it in this case, inasmuch as it shows a clear intention on the part of the legislature to constitute a real representative, and such a representative is not required on the devolution of an estate tail; in other words, an estate tail is not within the mischief which the Act proposes to remedy.

But, whether one concurs in the author's view or not, it is impossible to shut one's eyes to the shortcomings of the provisions which purport to constitute the real representative.

The author (pp. 29–31) treats as arguable the question whether, where land is settled by the will of the deceased or by reason of the succession of an infant heir, the real representatives are, as trustees with a power of sale,

constituted trustees for the purposes of the Settled Land Acts. Now leaseholds have always been within the operation of those Acts, and no one has thought of suggesting that executors as such had a power of sale within the meaning of the Acts. Again, when once the real representative has assented to the devise or conveyed the land to the heir, his power of sale is gone; in the meantime we conceive that the tenant for life could only sell subject to the executor's right to defeat the estate conveyed to the purchaser, who clearly could not be advised to accept such a title.

Attention is directed (pp. 48–50) to the unsatisfactory manner in which the Act proposes to discharge the real representative from liability, when he has assented to a devise, or conveyed the land to a beneficiary. There can be no doubt that the title to the land ought not to be saddled with an unascertained liability, and that in such cases the executor ought to be satisfied with an indemnity from the beneficiary; whether he will be satisfied or not is quite another matter. But to have put it in the power of a cantankerous executor to cast a slur on a perfectly good title does, we admit, appear to be a harsh and unnecessary measure.

As might be expected from the author of the well-known work on Charitable Bequests, the effect of the Act on a devise of land to charitable uses is (pp. 100–1) clearly brought out.

Our limited space will not permit of a full discussion of the views propounded by the author, but he may certainly be congratulated on the production of a very readable addition to the existing works on the law of administration of assets.

B. L. C.

The Science of Law and Law-Making. By R. Floyd Clarke. New York: The Macmillan Co. London: Macmillan & Co., Lim. 1898. 8vo. xvi and 473 pp. (17*s.* net.)

This book professes to be an introduction to law for the use of laymen, but it is really nothing but an elaborate argument against codification, in which the general reasons *pro* and *contra* are set forth with sufficient fairness and, we venture to think, more than sufficient fulness. We should have preferred less quotation and discussion of opinions, and something more of a serious attempt to ascertain how codes have worked where they are in existence. So far as we have observed, the Indian Penal Code is ignored, though the most is made of various criticisms on the Indian Contract Act. Nor has the author anything to say of the Bills of Exchange Act, now the law of a great part of the English-speaking world, which has produced almost no litigation, and is almost pure codification of common-law decisions. Actual English experience has now shown, we submit, that well settled commercial law may be codified with safety and advantage. We do not even hear how the practical administration of the law has been affected in those Western states which have adopted the Dudley Field codes (an adverse opinion, and a weighty one, is quoted from California, but no specific examples, and nothing to show whether men of business like the code, or dislike it, or pay no attention to it). Mr. Floyd Clarke might have strengthened his case, too, by referring to the political as distinct from legal reasons which have left France, Italy, and more lately the German Empire, practically no choice as to codification; the object being not to codify a single existing body of customary law, but to put one law in the place of many. All these omissions are the more strange because the author him-

self complains—and rightly enough, we think—that hitherto the discussion has run too much to generalities.

Two more than doubtful assumptions run more or less through the whole of the book: one, that Roman law has some kind of inherent fitness for codification as contrasted with English law; the other, that modern advocates of codification expect codes to make case-law superfluous, which some of them at least have been careful to deny. The author supposes, moreover, that in this country the Rules of Court are construed on some different principle from statutes. We never heard of any such difference. If our Rules work better than the New York Code of Civil Procedure, it is not because there is more freedom of interpretation, but because there is a better text. But certainly one condition of express rules of any kind working well, whether they be called a code or not, is that the Court, committee, or other persons who have to interpret and apply them should not abandon their common sense. Apparently Mr. Floyd Clarke thinks such abandonment a necessary incident of interpretation when the statute to be interpreted is called a code. We really cannot see why.

There are one or two curious little inaccuracies. By some process which apparently is not a misprint, the date of the leading case of *Armory* v. *Delamirie* is given as 1795 instead of 1722; and the author approves a non-existent work called 'Sir Frederick Pollock's Digest of the Law of Evidence' [meaning Sir James Stephen's?] as being the nearest approach yet made in English law to a good code.

The Law of Employers' Liability and Workmen's Compensation. By Thomas Beven. London: Waterlow Bros. & Layton, Lim. 1898. 8vo. xxxvi and 326 + (index) xxx pp.

Mr. Beven has compressed an extraordinary amount of learning and ingenuity into what purports to be a modest practical handbook. The chapters on Negligence and Contributory Negligence really form a digest of the whole subject, in which all authorities of any importance are cited and their effect stated, and the points arising on them are briefly but adequately discussed. Our only doubt, in a general way, is whether Mr. Beven has not made the book almost too good for the work he expects it to do.

There are one or two points of difference with Mr. Beven that we have noted: in a topic so difficult even without the added perplexity of statutes it is inevitable that there should be room for different opinions. Part of Mr. Beven's Proposition XVI, in the chapter on Negligence, runs thus:—

'In determining whether an act is wrongful so as to found liability, only the reasonable [? natural] and probable consequences in the circumstances are to be looked to. When those reasonable and probable consequences indicate probable injury, then liability attaches for all the actual consequences flowing in uninterrupted sequence from the act.'

We are unable to agree with the last quoted sentence, which comes to saying that when liability for some damage is once established, no consequential damage is too remote to be counted. No such rule of extended liability is laid down by the authorities as we read them, and it would be a most inconvenient rule to explain to juries. A smaller and perhaps verbal point arises on Mr. Beven's statement (p. 3) that 'if a servant personally injures any one outside his relation of service, the injured person has a right of action *both for the damage and the insult* as in any other case.' The common law recognized insult as a distinct cause of action in the

thirteenth century, if we may trust the current forms of pleading, and we wish it still did so. But we have always supposed that the modern law does not, and that in particular our rules about 'actions on the case for words' assume the contrary throughout. We shall be only too glad if Mr. Beven can convert us.

Our old friend *Scott* v. *Shepherd* (the squib case) is cited as if the question had been whether the defendant was liable at all, and not whether the action would lie in trespass as distinct from case. This is a too common oversight. At Mr. Beven's hand we are entitled to better things.

We doubt whether the Workmen's Compensation Act is really quite so foolish as Mr. Beven makes it look, but his discussion of it will in any case be of great use.

Company Precedents, for use in relation to Companies subject to the Companies Acts, 1862 to 1890. Seventh Edition. By Francis Beaufort Palmer, assisted by the Hon. Charles Macnaghten, Q.C., and Arthur John Chitty. Part I. London: Stevens & Sons, Lim. 1898. La. 8vo. xcii and 1421 pp. (36*s.*)

The appearance of the seventh edition of this well-known work is significant in many ways. It attests the author's unabated popularity with the profession: it attests the enormous volume of company business now transacting, and lastly it attests—what is a consequence of that business—the rapid growth of company law. In the interval of something less than three years since the last edition there have been decisions of supreme importance to the commercial world on nearly all the leading principles of company law. There has been *Salomon* v. *Salomon*—the charter of the one-man company, and of its counterpart, the private company. There has been *Welton* v. *Saffery*, disallowing discount on the issue of shares as against shareholders as well as creditors. There has been *Bloomenthal* v. *Ford*, elucidating the doctrine of estoppel by certificate against a company. There has been *In re Wragg*, defining the right of inquiry into the adequacy of the consideration given for shares issued as paid up under a registered contract; and *In re Kharaskhoma*, exacting the statement in terms of the consideration under such a contract. There has been *In re Peveril Gold Mines*, disannulling a condition in articles derogating from the statutory rights of a shareholder; and *In re Brinsmead*, affirming it 'just and reasonable' that a company conceived and brought forth in fraud should be wound up; and *South African Territories* v. *Wallington*, refusing specific performance of a contract to make or take debentures. There has been *In re London & General Bank* (Nos. 1 & 2), delimiting the duties and liabilities of auditors; and *Metropolitan Coal Consumers Association* v. *Scrimgeour*, sanctioning payment by a company of a reasonable brokerage for underwriting its capital; and lastly, *Andrews* v. *Gas Meter Co.*, illuminating the whole subject of the issue of preference shares. All these—to name only a few—are matters which in Lord Bacon's phrase come home to the 'business and bosoms' of those who have to do with companies, be they lawyers or laymen, and they will all be found to be dealt with in this edition, and dealt with as only an expert of Mr. Palmer's wide experience and insight can deal with them; while their substance is skilfully woven into the fabric of his well-considered forms. But encomium is superfluous. There is no book which can challenge or attempt to challenge the supremacy of this work for the purpose of the company draftsman. It is—and in no conventional sense—indispensable.

A Digest of the Law of Agency. By WILLIAM BOWSTEAD. Second Edition. London: Sweet & Maxwell, Lim. 8vo. lii and 507 pp. (16*s.*)

THIS is a second edition, and not only an enlargement, having 507 pages instead of 394, but a more complete and valuable work. It is written in 146 'articles,' printed in larger type, and followed by 'illustrations' much in the same way that Roman law text-books are often prepared. Copious footnotes refer to the titles of the law cases bearing on the subject of each 'article.' A legal practitioner likes to know the 'feel' of the case cited, and perhaps might prefer to have case 'abstracts' in the usual form instead of these illustrations. The names of the judges who gave the respective decisions would, notwithstanding the general full confidence in our British judicial system, have some utility in enabling due weight to be given to these paragraphs. The articles referring to an agent who makes secret profits, to company directors who make private gain, and to solicitors as agents, are very well put together. The question of 'agency' is, however, one which has so many ramifications, that the mere suggestion of 'illustrations' is not a little likely to make one expect the impossible. The subject of the wife's agency for her husband is illustrated in many ways, and most efficiently, though such a case as that recently before a county court judge, where the wife took a house with her sister as 'guarantor' for the first quarter, not divulging the fact that her husband was in prison, but remaining in the house to let 'apartments,' is not quite covered by the 'articles.' The cases on the liability of the principal in the police courts for offences and quasi-criminal acts are well given in a supplementary chapter. Here too we miss the help which the names of the judges would have given, for Justice Manisty in *Bond* v. *Evans* said in so many words that the Lord Chief Justice thought (wrongly) that the connivance of the principal must be 'inferred' before he could be convicted of a licensing offence committed through an agent. Mr. Bowstead, however, tersely brings out the vital point, that the 'agent' must be in charge of the premises. The dictum of Justice Stephen in criticizing *Newman* v. *Jones*, where the principals were held not guilty, because they gave absolutely contrary directions to their 'steward' who committed the offence, might perhaps have thrown some light on this particular 'illustration.' The book is concisely written, and any lawyer who finds that the case he is dealing with involves some perplexing questions of agency, will be able in a very few minutes to find a sure foothold and a sufficient number of stepping-stones to enable him to get out of the morass of his difficulties. There is a good table of cases and a useful index.

The Law of Licensing. By JOHN BRUCE WILLIAMSON. London: William Clowes & Sons, Lim. 1898. 8vo. xxxv and 607 pp. (15*s.*)

MR. WILLIAMSON has chosen a subject wherein he has to compete with formidable rivals, but we venture to think he will not compete in vain. His book differs in both scope and method from other works on licensing. He treats of the law of licensing so far as it relates to the retail sale of intoxicating liquors and to the theatres and music halls. It is convenient to have these two branches of licensing law in one comprehensive work. But we find the chief merit of the book in the fact that the Acts of Parliament are not made the basis of arrangement of his subject-matter. Where a branch

of law is contained in one or more well arranged statutes the most convenient arrangement for a law book is usually to set out the statute or statutes with notes to each section. But when an author has to deal with some twenty principal acts and some forty others of greater or less importance, that method of treatment only ends in confusion, and the reader is wearied and disgusted by having to turn now to one page and now back to another before he can arrive at a solution of the simplest question. Mr. Williamson, to avoid this difficulty, has given us a clear, concise and well-arranged treatise on licensing, and has relegated the statutes to an appendix. We could wish that in the appendix he had given references under each section to the pages of the treatise where the section is dealt with. A good index only partly supplies this defect. With the treatise, which occupies about two-fifths of the whole work, we are greatly pleased. Perhaps it may safely be said, and without derogating from the merits of other well-known works, that the law of licensing has never before been set out so clearly and comprehensively. We have tested the text in various ways, and found it well up to date and on the whole accurate. The important cases of *Reg.* v. *Bowman* and *Reg.* v. *Sharman*, on mandamus and certiorari, are duly included in their proper places, though they only appeared in the Law Reports after the book came into our hands for review.

Mr. Williamson, like many other recent writers, has found the Local Government Act, 1894, a stumbling-block. In dealing with the illegal hiring of licensed premises for election purposes he has forgotten that local boards and improvement commissioners are now no longer elected, their place being taken by district councils. Though he has referred to sec. 61 of the Act of 1894, he has omitted the curious provisions with regard to the use of licensed premises for polls and for election meetings contained in the rules for the election of district and parish councillors and for polls consequent on parish meetings. Again, in treating of theatre licenses he has omitted to state that the duties of the County Council may be delegated to a district council, and has not referred to county boroughs. Nor has he referred to s. 78 of the Local Government Act, 1888, by which the procedure for licensing by County Councils is regulated.

We have looked in vain for some explanation of that very obscure proviso in sec. 23 of the Theatres Act, 1843. We should have welcomed some suggestion as to how the 'allowances' of 'justices or other persons having authority in that behalf' should be applied for; who the 'other persons having authority in that behalf' are; and whether it is the theatrical representation in a fair, or the booth or show, that they allow.

Tarling v. *Fredericks*, 28 L. T. 814, a decision on this Act, is not referred to. Perhaps because no one knows what it decides.

Oversights such as these will not however seriously detract from the usefulness of Mr. Williamson's work.

Powell's Principles and Practice of the Law of Evidence. Seventh Edition. By JOHN CUTLER, Q.C., and CHARLES F. CAGNEY. London: Butterworth & Co. 1898. 8vo. lv and 660 pp. (20*s.*)

THIS work is sufficiently well known to the profession to make any detailed examination of its merits out of place. The new cases seem to be incorporated into the body of the work with care and accuracy. The editors have wisely given only one reference to reports in the text, supplying others in the table of cases; they quote the Justice of the Peace occasionally.

and the Times Law Reports apparently not at all, a practice the merits of which we leave our readers to decide on. We have doubts as to how far they are well advised in retaining their chapters on Discovery and Interrogatories and the Production and Inspection of Documents, as they seem too short for some purposes and too long, the latter at least, for others. They are, however, good pieces of work, and the size of the volume is not yet oppressive, so that they have probably exercised a wise discretion in leaving them as they are. On the other hand, secs. 4–7 of the Bills of Sale Act, and the Betting and Loans (Infants) Act do not seem worth including in a work on Evidence, and the abortive Criminal Evidence Bill of last year, in its unamended form too, is certainly not worth printing. The omission of a table of statutes is a blot in a work which has reached its seventh edition.

The Law of Evidence. By SIDNEY L. PHIPSON. Second Edition. London: Stevens & Haynes. 1898. 8vo. xcvii and 637 pp. (*12s. 6d.*)

IN the preface to the first edition of this work the author described his aim as being to supply a work which would occupy a middle position between Stephen's Digest of the Law of Evidence and Taylor on Evidence. He now, after the lapse of six years, boldly challenges comparison with the latter work, alleging that his book is the fuller of the two on all topics properly included in a work on Evidence, and that it now supplies 'a practically complete digest' of English and Irish decisions. We are fortunately not called upon to discuss the truth of the first of these allegations, which it may be thought had been better left unmade. As to the second a necessarily brief but careful examination leads us to believe that it is well founded. Such cases as we have looked for we have found correctly and clearly described in the right places, as far at least as their immediate neighbours are concerned. The same may be said on the whole as to the numerous and complicated statutory provisions which make a great variety of documents evidence to very various extents; though we should like to see some of them rather more fully dealt with, and there seems to be no reference to 35 & 36 Vict. c. 94, s. 51. Mr. Phipson's forward movement has had the effect of producing a considerable increase in the bulk of the work, this edition containing 637 pages as against 448 in the last; but the book still remains a small one. This merit probably more than counterbalances the prominence which additional size gives to the rather haphazard scheme on which the book is arranged. A very fair index, however, and a long list of cited cases make this a matter of comparative indifference to the practitioner. As to the student, we were, it appears, wrong six years ago in prophesying, as we did, that the book was not specially designed for his purposes. We will, therefore, content ourselves on this occasion by a guess that when he has fully mastered the contents of this edition there will be a new one ready for him.

Commentaries on the Law of Trusts and Trustees as administered in England and in the United States of America. By CHARLES FISK BEACH. London: James Berkinshaw. 1897. 2 vols. La. 8vo. ccxxxiii and 1753 pp.

FEW persons realize what they owe to the text-writer. When the intelligent layman confronts us with the question 'What is the law, where is the law?' on some subject, say Trusts or Wills or Mortgages, all

the lawyer—be he of America or be he of England—can reply is 'The law is a body of abstract principles, and if you want to know it you will find the application of these principles to particular states of fact illustrated in some ten or twenty or thirty thousand cases on each topic, scattered over centuries of law reports from Edward I to Queen Victoria.' Imagine the situation of the layman, or even of the lawyer, left thus to find, unaided, his particular point—his needle in this haystack. To this bewildered seeker after knowledge the text-writer brings welcome relief—educes order out of chaos—arranges, analyzes, compares, contrasts, criticizes, rationalizes. The work before us is a good illustration. It is distilled from not less than sixteen thousand cases; it is full, careful, learned, methodical, judicial; the whole domain of Trust land is mapped out, and its highways, by-ways, pitfalls and thickets minutely and clearly delineated. Incidentally the author remarks, and well he may, how lightly persons undertake the office of a trustee—those duties and liabilities which two thick volumes of more than 800 pages each can scarcely contain. Yet when we think of it, what does a request to act as trustee really mean? It comes to this: 'Will you be so kind as to undertake the management of my affairs and my family's for an indefinite period—to bestow more pains and care upon them than I should myself, at the risk of being answerable—and no quarter given—for the slightest indiscretion, and to do all this for nothing?' Stated thus—and not over-stated—the coolness of the proposal becomes apparent: yet do settlors or testators ever realize this? Do they even manifest any gratitude? Not one in a hundred.

The stream of American and English trust law flows from the same source and follows the same direction: hence the present work appeals as much to English as American lawyers; what meanderings or cross-currents there are rather help to point the true course. In America, for instance, trustees' investments are not defined by law. The test is simply, 'Is it a "fit security"?' This leaves the discretion rather too much at large. On the other hand America is fortunate in not having imported the ideal prudent man of business. This superior person—the bane of British trustees—rendered an antidote absolutely necessary, and we have got it in the Judicial Trustees Act of 1896, giving the Court power to relieve trustees where they have acted 'honestly and reasonably.' One other advantage America possesses, and that is 'Spendthrift Trusts,' designed not only for young gentlemen of extravagant habits but for ladies. Surely here is a chance for English conveyancers!

The Law of War. By JOHN SHUCKBURGH RISLEY. London: A. D. Innes & Co. 1897. 8vo. vii and 307 pp. (12*s.*)

THE modesty of the author who disclaims any pretension to offering his work as a legal text-book and only hopes that it will be found useful as a 'first guide to seekers after knowledge, and possibly also to law-students by way of an introduction to more elaborate treatises' does not debar us from applying to it the severer tests of criticism. Even an introduction or 'first guide' should give its authorities. The value of a quotation is singularly diminished by the omission of the reference which enables the reader to consult the context. An expression of opinion, if it is that of the writer, should be distinctly shown to be his, and if it is not his, it should be as distinctly attributed to its real author, and no disclaimer or modesty can relieve the author of a book on the *law* of war from giving authorities for statements, even if only opinions like his own. Indeed the more elementary

a book is, the more careful should the writer be to indicate the sources in which the student can seek for himself. Mr. Risley is vexingly remiss in these respects.

Nor is he always accurate, as when he attributes the 'three mile limit' of territorial waters to Bynkershoek and to the end of the seventeenth century (p. 46); nor always precise, as when he says that certain persons under the fiction of exterritoriality are subject to the *personal* jurisdiction of their own country, or when he says a private ship enjoys exterritoriality 'if she is driven into a foreign port by stress of weather or illegal force' (p. 47); nor quite up to date, as when he cites a case of 1588 for his statement that 'if a belligerent brings prisoners of war into neutral territory they become *ipso facto* free, except in the case of prisoners of war on board a public vessel anchoring in neutral waters' (p. 174).

We can say generally of Mr. Risley's book that though it may not be a very good introduction for law students, it contains a great deal of information in small compass for lay readers, and that it has a good index.

Encyclopaedia of the Laws of England. Edited by A. Wood Renton. Vols. VII and VIII. International Copyright to Mortgage. London: Sweet & Maxwell, Lim. Edinburgh: W. Green & Sons. 1898. La. 8vo. Vol. VII, viii and 520 pp.; Vol. VIII, viii and 526 pp. (20*s.* net.)

The publication of four volumes of this work within six months is an achievement for which the editor and publishers may well take credit. Several of the most important heads of the law are dealt with in the two volumes now issued. Mr. E. Foà and Mr. T. C. Hindmarsh contribute a long article on 'Landlord and Tenant.' Mr. G. G. Phillimore writes on 'Marine Insurance' and Mr. W. F. Phillpotts on 'Mortgage.' Among the other articles of exceptional interest are 'Interpretation' (not confined to the interpretation of deeds, and therefore a real addition to the well-known book) by Sir Howard Elphinstone; 'International Law' (with a useful guide to the bibliography of the subject) by Mr. T. Barclay; 'Jurisprudence' by Prof. Holland; 'Larceny' by Mr. W. F. Craies; 'Law Reporting' by Sir F. Pollock; 'Law Reports' (a list of Colonial and Indian reports) by Mr. W. F. Craies and Mr. T. Raleigh; 'Licensing' by Mr. W. W. Mackenzie and Mr. H. Woodcock; 'Lunacy' by Mr. Wood Renton; and 'Mines and Minerals' by Mr. R. F. MacSwinney. There are several articles dealing directly or indirectly with local government: 'Local Government' and 'Local Government Board' by Mr. Blake Odgers, Q.C.; 'London City,' 'London County,' and 'Metropolitan Police District' by Mr. W. F. Craies; and 'Metropolitan Vestries' by Mr. H. W. Law. We must also mention articles on 'Malice' by Mr. W. F. Craies, where the effect of *Allen* v. *Flood* is judiciously touched upon; 'Maxims' (with a list) by Mr. Manson, and 'Lloyd's'—a short but clear account of the institution and of the customs of underwriters, by Mr. G. G. Phillimore. We are unable, with great respect, to agree with Mr. Blake Odgers (*s. v.* Justification) that a justified libel is not a libel at all. Why must justification be specially pleaded? But this is of no practical importance. Under the heading 'Manor' there surely ought to have been a reference to Serjeant Manning's excellent—we might say classical—article in the *Penny Cyclopaedia*. The article on 'Martial Law' refers to Blackburn J.'s charge to the grand jury in *R.* v. *Eyre*, but

omits reference to Cockburn C. J.'s in *R.* v. *Nelson and Brand* (also separately published), a case arising out of the same events.

Baker's Law relating to Burials. Sixth Edition. By E. Lewis Thomas. London: Sweet & Maxwell, Lim.; Knight & Co. 1898. 8vo. xxvii and 1011 pp. (25*s.*)

'Baker on Burials' is the standard work on this lugubrious subject, but sixteen years having elapsed since the appearance of the fifth edition the book had got rather out of date. The Burials Acts were considerably affected by the Local Government Act, 1894, particularly as to the formation and powers of Burial Boards. Further important changes in the law have been made by recent Open Spaces Acts. Mr. Lewis Thomas has had to grapple with so much new matter that he has found it necessary to recast the work and to rewrite many chapters. The law of burials is now governed, in addition to the Local Government Act of 1894, by something like eleven Burial Acts, four Open Spaces Acts, thirteen Church Building Acts, and several Public Health and Registration Acts. In view of this goodly crop of legislation, the legislature cannot justly be blamed for neglect of the subject; nor are we able to blame Mr. Thomas for the omission from the book of any of these Acts. They are all given in full, with annotations. There appears to have been very little recent case-law on the subject, but such decisions as there are are duly accounted for.

The Law relating to Electric Lighting. By John Shiress Will, Q.C. London: Butterworth & Co. 1898. La. 8vo. lv and 189 pp. + Index 42 pp. (15*s.*)

There is a certain fitness in the appearance of a book on electric lighting by the joint author of the standard work on the allied subjects of gas and water. The plan of the work consists of an Introduction giving a synopsis of the law on the subject; the Electric Lighting Acts, 1882 to 1890; the Board of Trade Rules with respect to applications for Provisional Orders; the Board of Trade Regulations for securing public safety, for ensuring a sufficient supply of electricity and for the control of existing lines and works laid down without license, provisional order or special Act; forms of accounts prescribed by the Board of Trade; and the form of a Provisional Order, with notes. Fortunately 'Electric Lighting' is a heading not yet frequently met with in the indexes to our law reports, but the few decisions on the subject—some of them not regularly reported—are duly accounted for. The only case, so far as we know, involving any important common law principle is *National Telephone Company* v. *Baker*, where an electric current discharged into the earth was treated as a dangerous thing: '93, 2 Ch. 186, duly noted in this book.

We have also received:—

Ruling Cases, arranged, annotated and edited by Robert Campbell. With American Notes by Irving Browne. Vols. XIV and XV. Insurance to Landlord and Tenant. London: Stevens & Sons, Lim. Boston, U.S.A.: The Boston Book Co. 1898. La. 8vo. Vol. XIV, xxvi and 833 pp.; Vol. XV, xxx and 811 pp. (25*s.* net.)—Insurance, Interest, Interpretation, Judge, Jury, Justice of the Peace, Land and Landlord and Tenant are the subjects dealt with in these volumes. An amplified Table of Contents has been added

to Vol. XV, and in the Preface, Mr. Campbell again states, for the information of the sceptical, that the work will be completed in twenty-five volumes, as originally estimated. We think the high standard attained by previous volumes of the work is fully maintained. Mr. Justice Mayne, one of the judges of the Court of Common Pleas in Ireland in the early part of this century, is erroneously called an English judge in the American notes, Vol. XV. p. 49.

Woodfall's Law of Landlord and Tenant. Sixteenth Edition, containing the statutes and cases down to Lady Day, 1898. By J. M. Lely. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1898. La. 8vo. lxxviii and 1112 pp. (38*s.*)—Great is the industry of Mr. Lely in keeping this work of composite learning, of which the original Woodfall must now be a very small part, posted up in successive editions. With regard to the Addenda, it may be noted that *Bryant* v. *Hancock*, there given from the Times L. R., is now regularly reported, '98, 1 Q. B. 716, 67 L. J. Q. B. 507. On the questions arising under Part I of the Land Transfer Act, so far as affecting the relations of landlord and tenant, Mr. Lely has done his best to lay fairly before the reader both the doubts created by the general language of the Act, and the materials available for a solution.

The Law of Insurance: fire, life, accident and guarantee. By J. B. Porter, assisted by W. F. Craies and T. S. Little. Third Edition. London: Stevens & Haynes. 1898. 8vo. xxxvii and 562 pp. (21*s.*)—There are books on insurance that deal with the whole subject—including marine insurance, and others that deal with fire insurance only, but we believe that this is the only work treating of all kinds of insurances other than marine. To compress so large a subject within less than 600 pages is not an easy task. But Mr. Porter and his assistants have done it, and, so far as we can judge, done it well. A welcome feature of the book is the citation of so large a number of American and Colonial cases. We cannot find any specific mention of burglary insurance—a class of risk in which a large business is now done by the guarantee and accident companies—but we notice that the recent case of *Roberts* v. *Security Company*, a decision under a burglary policy, is duly accounted for. Why is only a reference to the Times L. R. given to *London and Lancashire Life Insurance Company* v. *Fleming*, a Privy Council case reported in both the Law Reports and the Law Journal of last year?

The Principles of Equity, intended for the use of Students and the Profession. By Edmund H. T. Snell. Twelfth Edition. By Archibald Brown. London: Stevens & Haynes. 1898. 8vo. lxii and 874 pp. (21*s.*) —Snell's 'Principles of Equity' is too well known as a standard work to render necessary more than brief mention of the appearance of a new edition —the twelfth within thirty years. The bulk of the book has increased by nearly 100 pages, mainly through the addition of new cases. Mr. Brown, in his Preface, claims that he has adopted 'a somewhat novel and laborious mode of punctuation': but the method is not new. It was used—and abused—by Vesey and other reporters at the end of the last and the beginning of the present century. Mr. Brown has added the terrors of many 'rules' to those of Vesey's infinite commas and semicolons. We must frankly say that the device does not commend itself to us.

The Law of Trusts and Trustees; under the Trustee Act, 1888, the Trust Investment Act, 1889, the Trustee Act, 1893, the Trustee Act, 1893, Amendment Act, 1894, and the Judicial Trustees Act, 1896. By A. R.

RUDALL and J. W. GREIG. Second Edition. London: Jordan & Sons, Lim. 1898. 8vo. xxxvi and 366 pp. (12*s.* 6*d.* net.)—Since the first edition of this work was published in 1894 important changes in the law of trusts have been brought about by the passing of the Trustee Act, 1893, Amendment Act, 1894, and the Judicial Trustees Act, 1896. These Acts and Part I of the Land Transfer Act, 1897, dealing with the establishment of a real representative have been added to the work, together with the Judicial Trustee Rules and Forms issued under the Act of 1896. There are also further explanatory notes, and the clearest and most convenient list of authorized trustee investments that we have yet seen. The Appendices of Tables showing the sections of the Trustee Act, 1893, and the corresponding sections of the repealed Acts are also likely to be useful.

The Principles of the Law of Sedition. By J. CHAUDHURI. Calcutta: Weekly Notes Printing Works. 1898. 8vo. vii, 48 and liv pp. (Re 1.)—Mr. Chaudhuri was fully entitled to write and publish a controversial pamphlet against the recent amendments of the Indian Penal Code, but we cannot think he was well advised to call it 'The Principles of the Law of Sedition.' Mr. Chaudhuri's main point is that English law on this topic requires seditious intention to be found as one of the facts constituting the offence. For this he quotes Sir James Stephen's exposition in his 'History of the Criminal Law of England'; but he omits to quote Sir James Stephen's decided expression of opinion that the requirement is anomalous and unfortunate. He also slurs over the fact that there was nothing about intention in s. 124A of the Penal Code as it stood. And he assumes, as if it called for no proof or discussion, that British Indian legislation must be wrong if it departs in any point from English common law as interpreted by Mr. Chaudhuri.

Die Entwicklung des englischen Erbrechts in das Grundeigenthum (a discourse delivered to the *Volkswirthschaftliche Gesellschaft zu Berlin*. Von LUJO BRENTANO. Berlin: Leonhard Simion. 1898. 8vo. 31 pp. (1 mk.)—This discourse, which is stated to be the forerunner of a nearly finished work, is a popular exposition for a German audience of the history of inheritance in England. Authorities are not given, and German equivalents are found, with great felicity so far as we can judge, for English terms of art. The only criticism we have to make is that Prof. Brentano seems rather to underrate the economic importance of our modern unlimited power of disposing of land by will, and to overrate the proportion of English land under strict settlement, which however many English writers have done.

Outlines of the Law of Torts. By RICHARD RINGWOOD. Third Edition. London: Stevens & Haynes. 1898. 8vo. xlv and 289 pp. (10*s.* 6*d.*)—In this edition—to quote the Preface—'Many fresh cases of importance have been added. The judgment of the House of Lords in *Allen* v. *Flood*, and its effect on previous cases, have been dealt with. The text of the Workmen's Compensation Act, 1897, has been given in full and explained, and the decisions on the Employers' Liability Act, 1880, have been noted.' The remarks on *Allen* v. *Flood* seem quite sound so far as they go.

Principles of the Common Law, intended for the use of students and the Profession. By JOHN INDERMAUR. Eighth Edition. London: Stevens & Haynes. 1898. 8vo. xxxvii and 578 pp. (20*s.*)—The author in the Preface to this edition states that he has added many cases and dealt briefly with the Workmen's Compensation Act, 1897: and that generally he has thoroughly revised the work and brought it up to date. The book is not

and hardly pretends to be, of any scientific value, but it is evidently found useful for the Incorporated Law Society's examinations.

The Yearly Abridgment of Reports: being a full analysis of all cases decided in the superior courts during the legal year 1896–7.... by ARTHUR TURNOUR MURRAY. London: Butterworth & Co. 1898. La. 8vo. lxiii and 381 pp.—We doubt whether an analytical index of cases alphabetically arranged like an ordinary Table of Cases will effectually take the place of a digest in the usual form, even with the help of a subject-index to the points of law. But the experiment is ingenious and interesting, and we await the result with an open mind. The author has not copied head-notes but made a fresh analysis of every case.

Alphabetical Table of Public General Acts in force relating to England. 20 Hen. 3 (1235) to 60 & 61 Vict. (1897). By PAUL STRICKLAND. London: Wm. Clowes & Sons, Lim. 1898. 8vo. 67 pp. (*2s. 6d.*)—This table, being arranged under the short titles of the Acts, with the reference to regnal year and chapter following, is not quite like any other heretofore published, and will probably be found useful. Temporary Acts not yet formally repealed appear to be included. The only amendment we can suggest for a future edition is that the popular short titles which have sometimes been disregarded in official nomenclature should be inserted by way of cross-reference. Not one equity lawyer in twenty remembers that Locke King's Act is the 'Real Estate Charges Act, 1854,' by its new statutory name, nor has the profession become accustomed to call Lord Campbell's Act the 'Fatal Accidents Act, 1846.'

The Government of India: being a digest of the statute law relating thereto, with historical introduction and illustrative documents. By Sir COURTENAY ILBERT, K.C.S.I. Oxford: At the Clarendon Press. 8vo. xl and 608 pp. (*21s.*)—The modest title of this volume conceals a great deal of important and interesting work which we hope to notice more fully hereafter.

The Judicial Trustees Act, 1896 (London: Effingham Wilson. 1898. 8vo. vi and 83 pp. *2s. 6d.*) is stated to be 'a short explanatory and critical handbook for professional and other readers.' It has the merit of being short at any rate, and as a handy reprint of the Act it may be useful. The other epithets, having regard to the scantiness of the notes, are rather ambitious.

Murder by Warrant. By E. P. COLLIS. London: Kelvin, Glen & Co. 1898. 8vo. xv and 253 pp.—An argumentative romance to advocate a Court of Criminal Appeal. The author's name is not in the Law List.

The Hudson's Bay Company's Land Tenures, and the occupation of Assiniboia by Lord Selkirk's settlers, with a list of grantees under the Earl and the Company. By ARCHER MARTIN. London: Wm. Clowes & Sons, Lim. 1898. La. 8vo. ix and 238 pp. (*15s.*)

The Revised Reports. Edited by Sir F. POLLOCK, assisted by R. CAMPBELL and O. A. SAUNDERS. Vol. XXXIV. 1829–1832 (2 Russ. & My.; 1 & 2 Hogan; Younge; 10 B. & C.; 5 Man. & Ry.; 8 Bing.; 1 Moo. & Sc.; 4 C. & P.; Danson & Lloyd; 9 L.J.(O.S.)). London: Sweet & Maxwell, Lim.; Boston, Mass.: Little, Brown & Co. 1898. La. 8vo. xv and 833 pp. (*25s.*)

The Coroners Acts, 1887 and 1892, with Forms and Precedents. By RUDOLPH E. MELSHEIMER, being the Sixth Edition of the Treatise by

Sir JOHN JERVIS on the office and duties of Coroners. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1898. 8vo. xix and 264 pp.

Selected Cases on the Law of Partnership, including Limited Partnerships. By FRANCIS M. BURDICK. Boston, Mass.: Little, Brown & Co. 1898. La. 8vo. xi and 691 pp.

The Law of Evidence applicable to British India. By AMEER ALI and JOHN GEORGE WOODROFFE. Calcutta: Thacker, Spink & Co. 1898. 8vo. cxxxix and 1092 pp. (Rs. 24.)

Cases on American Constitutional Law. Edited by CARL EVANS BOYD. Chicago: Callaghan & Co. 1898. La. 8vo. xi and 678 pp.

Principles of the Law of Consent, with special reference to Criminal Law. By HUKM CHAND. Bombay: Bombay Education Society's Press. 1897. La. 8vo. xviii and 581 pp.

Industrial Experiments in the British Colonies of North America. By ELEANOR LOUISA LORD. Baltimore: Johns Hopkins Press. 1898. 8vo. x and 154 pp.

The Law relating to the Administration of Charities under the Charitable Trusts Acts, 1853–1894, and Local Government Act, 1894. By THOMAS BOURCHIER-CHILCOTT. London: Stevens & Haynes. 1898. 8vo. xxiii and 367 pp.

The Redemption of Bills of Sale: a defence of the Statutory Form. By JAMES WEIR. London: Sweet & Maxwell, Lim. 1898. 8vo. vii and 47 pp. (*2s. 6d.* net.)

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.
